



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

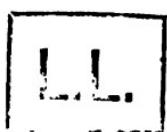
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

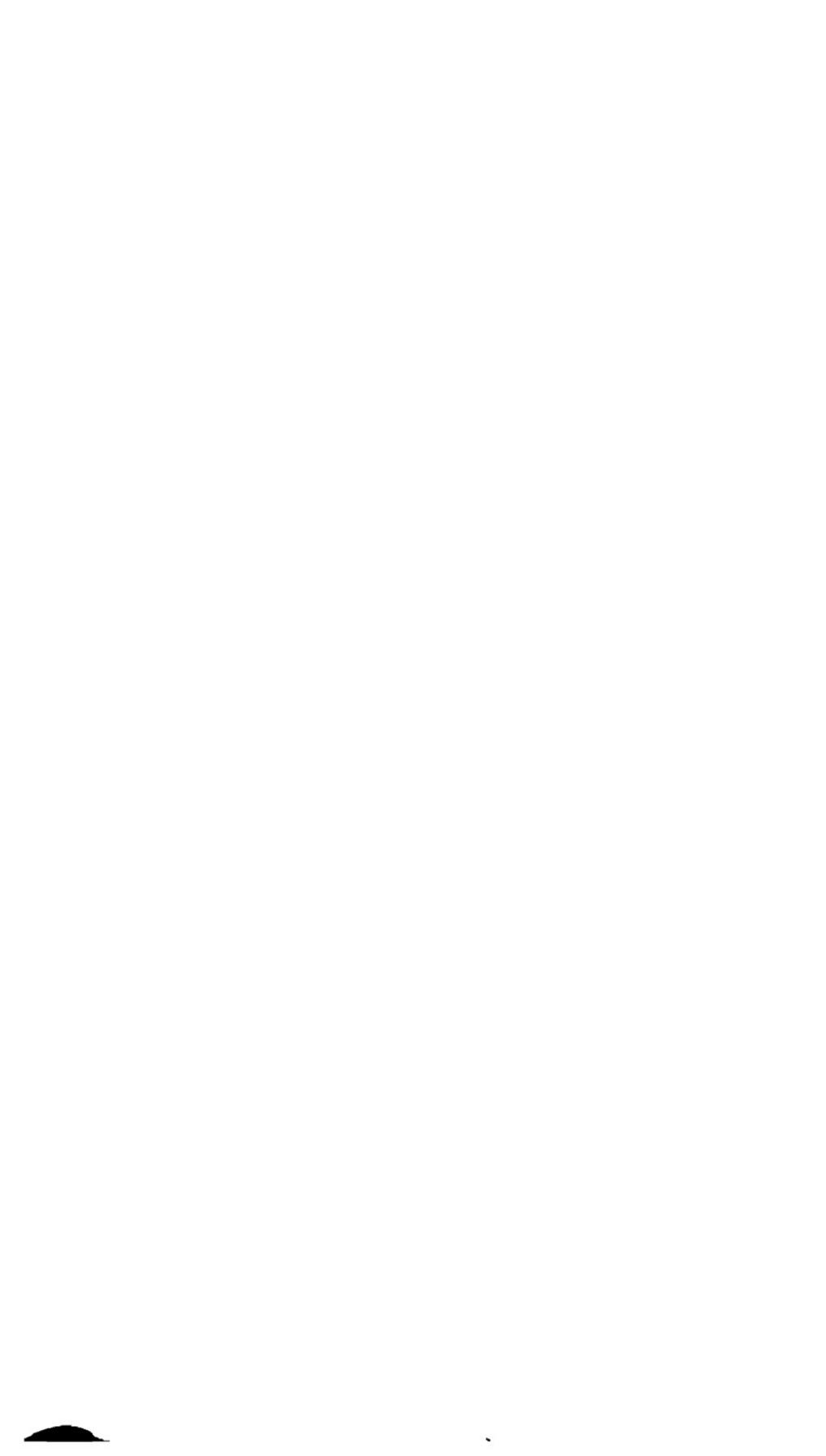
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



U.S.A.

Ga. 100

30



REPORTS 499

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

FROM COLUMBUS TERM TO CASSVILLE TERM, 1855
INCLUSIVE.

THOS. R. R. COBB, REPORTER.

VOL. XVII. No. —

Law Scho

or the

ATHENS, GA. CINCINNATI COLLEG.
REYNOLDS & BRO.

1856.



Entered according to the Act of Congress, in the year 1856, by THOMAS R.
R. COBB, in the Clerk's Office of the District Court of the Northern Dis-
trict of Georgia.

JUDGES OF THE SUPREME COURT.

HON. JOSEPH H. LUMPKIN, Athens,
HON. EBENEZER STARNES, Augusta.
HON. HENRY L. BENNING, Columbus.
THOS. R. R. COBB, REPORTER, Athens.
ROBERT E. MARTIN, CLERK, Milledgeville.

JUDGES OF THE SUPERIOR COURTS,

PRESIDING DURING THE PERIOD OF THESE REPORTS.

Eastern District,	Hon. Wm. B. FLEMING, Savannah.
Middle District,	Hon. WILLIAM W. HOLT, Augusta.
Northern District,	Hon. GARNETT ANDREWS, Washington.
Western District,	Hon. JAMES JACKSON, Monroe.
Ocmulgee District,	Hon. ROBERT V. HARDEMAN, Clinton.
Southern District,	Hon. P. E. LOVE, Thomasville.
Flint District,	Hon. Jas. H. STARKE, Griffin.
Coweta District,	Hon. O. A. BULL, LaGrange.
Chatahoochee District,	Hon. M. J. CRAWFORD, Columbus.
Cherokee District,	Hon. TURNER H. TRIPPE, Cassville.
Southwestern District,	Hon. W. C. PERKINS, Cuthbert.
Macon District,	Hon. A. P. POWERS, Macon.
Blue Ridge District,	Hon. DAVID IRWIN, Marietta.



TABLE OF CASES.

**Arranged in the order of their Decision, with a Note of the
Questions of Law considered.**

COLUMBUS—*January Term, 1855.*

1.	D. Thornton et al. vs. D. Hightower. <i>Equity Practice</i>	1
2.	T. H. Everett et al. ex'rs, vs. G. W. Towns. <i>Specific Performance</i>	15
3.	E. B. Young, assignee, vs. J. Harrison and another, adm'r's, <i>Measure of Damages</i>	30
4.	E. Molyneux et al. vs. Geo. W. Collier. <i>Satisfaction. Equity Jurisdiction</i>	46
5.	A. McDongald et al. vs. W. A. T. Maddox and Wife. <i>Multifariousness. Discovery</i>	52
6.	W. F. Hamrick et al. vs. J. R. Rouse et al. <i>Constitutional Law. County Site</i>	56
7.	W. G. Dinkins et al. vs. T. Moore et al. <i>Attestation of Deed</i>	62
8.	Creamer & Graham vs. H. Shannon. <i>Proof of Book Account</i>	65
9.	W. Brady vs. Hardeman & Hamilton. <i>Effect of want of Process</i>	67
10.	Watkins, Chappell & Co. vs. S. A. Smith. <i>Misnomer in Appeal. Attorney. Witness</i>	68
11.	L. Dunn vs. J. Crozier, adm'r. <i>Brief of Evidence</i> . 12. D. Curry vs. J. P. Gaulden et al. <i>Hiring of Slaves</i> .	70
13.	James A. Hannahan vs. James W. Nichols. <i>Ne exceat regno</i>	77
14.	W. A. Rawson vs. W. B. Cochran. <i>Garnishment. Partners</i>	80
15.	J. L. Williams et al. vs. A. A. Allen, ex'r. <i>Deed of Trust. Husband and Wife. Mistake</i>	81

TABLE OF CASES.

16. H. Shannon vs. Roosevelt, Hyde & Clark. <i>Ca. Sa. Bond. Appearance.....</i>	88
17. T. S. Tuggle, adm'r, vs. S. Wilkinson. <i>Pleading. Act of 1847.....</i>	90
18. J. S. Miller vs. I. J. Sanders et al. <i>Sufficiency of Answer.....</i>	92
19. B. F. Griffin vs. The Justices, &c. <i>New Trial. Stat. of Lim.....</i>	96
20. The Lessee of Veasey vs. Graham et al. <i>Trustees. Decd of Bank. Notice.....</i>	99
21. J. G. Tompkins vs. Y. F. Tigner. <i>Hire of Slaves.</i>	103
22. B. F. White vs. J. T. Wallen. <i>Practice Superior Court. New Trial.....</i>	106
23. J. B. Griffin vs. M. J. Stamper and another. <i>Forged Bond. Stat. of Lim.....</i>	108
24. J. M. Mahone vs. The Central Bank. <i>Bill of Exchange. Stat. of Lim.....</i>	111
25. W. C. Osborne vs. The Ordinary, &c. for use Robt. E. Huey. <i>Equity Jurisdiction in Suits on Guardian's Bond.....</i>	123
26. T. O. Walker et al. vs. E. Cook. <i>Amendment.....</i>	126
27. Jas. L. Hester vs. The State. <i>Criminal Law.....</i>	130
28. James Branan vs. P. J. May. <i>Obstruction of Highway</i>	136
29. J. D. Roseberry vs. C. Roseberry. <i>Temporary Alimony.....</i>	189
30. R. J. Snelling vs. S. Darrell. <i>Amending Motion for New Trial.....</i>	141
31. J. Mercer vs. The State. <i>Jury. Drunkenness. Verdict.....</i>	146
32. W. D. Shockley vs. G. O. Davis et al. <i>Attachment Bond.....</i>	175
33. W. D. Shockley vs. G. O. Davis et al. <i>Specific Performance</i>	177
34. J. Johnson, Ordinary, &c. vs. The Gov. ex rel. &c. <i>Poor School Fund.....</i>	179
35. A. E. McDougald, adm'x, vs. Ed. Carey, assignee. <i>Practice as to Sci. Fa.....</i>	185

TABLE OF CASES.

XL

36. E. Kellogg & Co. vs. Buckler & Short <i>et al.</i> <i>Dormant Judgment.</i> <i>Alias Fi. Fa.</i> <i>Ruling Sheriff...</i>	187
37. The Central Bank vs. W. Williams, adm'r. <i>Dormant Judgments.....</i>	193
38. J. T. Boyd vs. The State. <i>Killing an Officer.</i> <i>Practice.....</i>	194
39. J. L. Terry vs. The State. <i>Refusal to Charge.</i> <i>New Trial.....</i>	204
40. A. J. Robison vs. John Banks. <i>Fees of Witnesses.</i> <i>Subpana.....</i>	211
41. P. A. Clayton vs. D. Brown. <i>Fraudulent Conveyances.....</i>	217
42. W. V. Burney vs. A. Spear and another. <i>Trusts and Trustees.....</i>	223
43. B. O. Keaton <i>et al.</i> vs. The Gov. for the use, &c. <i>New Trial.....</i>	228
44. W. A. Redd <i>et al.</i> vs. D. Clopton <i>et al.</i> <i>Distribution.</i> <i>Cousins.....</i>	230
45. H. McGlawn, adm'r, vs. D. McGlawn. <i>Testamentary Papers.....</i>	284

MACON—*February Term, 1855.*

46. G. R. Hunter, adm'r, &c. vs. J. Stembridge <i>et al.</i> <i>Ratification of Contract.....</i>	243
47. P. B. Cox vs. The Mayor, &c. Griffin. <i>Equity Pleading.</i> <i>Practice.....</i>	249
48. J. Knight, <i>pro. ami,</i> &c. vs. R. V. Hardeman <i>et al.</i> <i>Manumission.</i> <i>Free Persons of Color.....</i>	253
49. D. C. Gresham, Ordinary, vs. L. Pyron. <i>Mandamus.</i> <i>Temporary Letters.....</i>	263
50. G. T. Welborn vs. W. W. Weaver <i>et al.</i> <i>Lim. of Actions.</i> <i>Testamentary Papers.</i> <i>Escrow.....</i>	267
51. W. J. Russell vs. E. Slayton. <i>Dispossessing Claimant.....</i>	277
52. G. W. Hollifield, adm'r, <i>et al.</i> vs. John D. Stell. <i>Construction of Wills.</i> <i>Estate Tail.....</i>	280
53. Charles Clements vs. W. P. Maloney, adm'r. <i>Costs</i> <i>vs. Adm'r.....</i>	289

TABLE OF CASES.

54. M. Sharp <i>vs.</i> The Stat ^e . <i>Retailing without License</i>	290
55. Jas. O. Hodges <i>vs.</i> Myers, Suydam & Co. <i>Rule vs. Sheriff</i>	292
56. B. W. Woods, ex'r, <i>vs.</i> Woods <i>et al.</i> <i>Surrender Insolvent Debtor by Securities</i>	293
57. J. Downs and another <i>vs.</i> G. Yonge, Supt. &c. <i>Deed, valid or void</i>	295
58. C. Lewis <i>vs.</i> Allen & Leak. <i>Admissions of Partners</i>	300
59. W. Woods and another <i>vs.</i> McGuire's Children. <i>Ejectment. Examination Witnesses</i>	303
60. R. Redding and another <i>vs.</i> The Central R. R. & B'k'g Co. <i>Constitutional Law</i>	323
61. M. D. Barnes <i>vs.</i> E. L. Strohecker. <i>Covenants: Practice</i>	340
62. Freeman & Penton <i>vs.</i> Carhart Bros. & Co. <i>Partnership. Justice's Court</i>	348
63. R. Corry, adm'r, &c. <i>vs.</i> N. Tompkins. <i>Charge of the Court</i>	351
64. N. Tompkins <i>vs.</i> The State. <i>Criminal Law and Practice</i>	356
65. W. Woods and another <i>vs.</i> McGuire's Children. <i>Verdict</i>	361
66. C. Walker, ex'r, <i>vs.</i> W. Hunter <i>et al.</i> <i>Wills. New Trial</i>	364
67. W. Mitchell <i>vs.</i> L. Pyron. <i>Service in Court of Ordinary. Appeal</i>	416
68. J. J. Wright <i>vs.</i> W. B. Greenwood & Co. <i>New Trial</i>	418
69. W. Johnson, adm'r, <i>vs.</i> L. Worthey. <i>Witness. Evidence</i>	420
70. J. A. Wade <i>et al.</i> <i>vs.</i> James A. Russell. <i>Separate Estate</i>	425
71. J. H. Gilmer, assignee, <i>vs.</i> Warren & Scarborough. <i>Certiorari. Judgment</i>	426
72. S. F. Miller <i>et al.</i> <i>vs.</i> Conklin & Co. <i>Fraudulent Assignment</i>	439
73. Causey & Oslin <i>vs.</i> J. A. Miller. <i>New Trial</i>	435
74. L. W. Cooper <i>vs.</i> The State. <i>Sci. Fa. vs. Bad</i>	437
75. Chas. Dacey <i>vs.</i> The State. <i>Criminal Law</i>	439

TABLE OF CASES.

XIII.

76. J. Pryor and another <i>vs.</i> M. Coggin <i>et al.</i> <i>Charge of Court</i>	444
77. A. Reeves <i>vs.</i> R. W. Matthews. <i>Witness. Estoppel</i>	449
78. J. J. Strawbridge <i>vs.</i> H. T. Mann <i>et al.</i> <i>Dormant Judgment</i>	454
79. C. Phillips <i>vs.</i> The State. <i>Forgery</i>	459
80. W. T. Smith <i>vs.</i> The State. <i>Practice</i>	462
81. D. E. Haynes <i>vs.</i> The State. <i>Homicide</i>	465
82. J. D. Clark and another <i>vs.</i> C. Clark <i>et al.</i> <i>Construction of Will</i>	485

CASSVILLE—April Term, 1855.

83. G. H. Couch <i>vs.</i> J. Turner, Sr. <i>et al.</i> <i>Ejectment. Lessors</i>	489
84. W. L. Hammond <i>vs.</i> Jas. M. Stovall. <i>Lien of judgment on property removed</i>	491
85. E. Woods <i>vs.</i> A. Howell. <i>Abatement of Action. Seire Facias</i>	495
86. Z. McGuffie <i>vs.</i> The State. <i>Criminal Law. Jury</i>	497
87. W. F. Janes <i>vs.</i> The Trustees of Mercer University. <i>Witness. Contract</i>	515
88. J. Taylor <i>et al.</i> <i>vs.</i> Johnson, Gov. &c. <i>Sheriff's Bond. Liability, &c.</i>	521
89. W. Kinsey <i>et al.</i> <i>vs.</i> The Lessee of Sensbough.— <i>Ejectment. Demises</i>	540
90. J. R. Matthews' <i>et al.</i> <i>vs.</i> J. R. Stanford <i>et al.</i> <i>Corporator's liability</i>	543
91. D. A. Walker, guar. <i>vs.</i> A. J. Wells. <i>Mistakes in Grant</i>	547
92. T. Allan <i>vs.</i> Comstock & Bro. <i>Parol evidence to vary Contract</i>	554
93. J. J. Printup <i>vs.</i> D. R. Mitchell. <i>Specific Performance. Evidence</i>	558
94. Baker, Wilcox & Co. <i>vs.</i> R. Herndon. <i>Statute of Frauds</i>	568
95. N. Bass <i>vs.</i> A. Stevens. <i>Plea to Jurisdiction</i>	572

96. D. R. Mitchell vs. The Rome R. R. & S. Co. <i>Stockholder. Liability</i>	574
97. T. Waters vs. Greenway Bros. & Co. <i>Attorney's Lien</i>	592
98. R. J. Johnson vs. D. R. Mitchell. <i>Liens of Judgments</i>	593
99. J. Norwood vs. L. Hardy <i>et al.</i> <i>Commission of Lunacy</i>	595
100. J. Rogers vs. W. Solomons, <i>et al.</i> adm'rs. <i>Supplemental Bills</i>	598
101. J. A. Paxson vs. A. P. Bailey and another. <i>Adverse Possessors</i>	600
102. J. Kerley vs. E. H. Richardson. <i>Damages for breach of Bond</i>	602
103. J. S. Swift vs. T. Crow. <i>Damages. Penalty</i>	609
104. The State <i>ex rel. &c.</i> vs. W. Woody <i>et al.</i> <i>County site</i>	612
105. Jas. Selman & Co. vs. S. M. Shackelford. <i>Claim. Certiorari</i>	615
106. J. G. McAllister vs. The State. <i>Demand for Trial</i> . 618	
107. J. T. Tucker <i>et al.</i> vs. A. Shorter <i>et al.</i> <i>Public Agents. Liability</i>	620
108. Shropshire & Hawkins vs. J. A. Stevenson. <i>Execution of Interrogatories</i>	622
109. R. T. Dobbs and another vs. The Justices, &c. <i>Attachments. Sheriff's Liability</i>	624

TABLE OF CASES REPORTED IN THIS VOLUME,

ALPHABETICALLY ARRANGED.

A.	Downs and another <i>vs.</i> Yonge, Su- perintendent, &c.....	295
Abbott, relator, Johnson, Ordinary, <i>rs.</i>	179 Dunn <i>vs.</i> Crozier, adm'r.	70
Allen, ex'r, Williams <i>et al. vs.</i>	81 E.	
Allen & Leak, Lewis <i>vs.</i>	300 Everett <i>et al. ex'rs, vs.</i> Towns.....	18
Allen <i>vs.</i> Comstock & Bro.....	554 F.	
B.	Freeman & Benson <i>vs.</i> Carhart	
Bailey, Paxson <i>vs.</i>	600 Bro's & Co.....	348
Baker, Wilcox & Co. <i>vs.</i> Herndon.....	568 G.	
Banks, Robison <i>rs.</i>	211 Gauldin <i>et al. Curry vs.</i>	72
Barnes <i>vs.</i> Strohecker.....	340 Gilmer <i>vs.</i> Warren and another.....	426
Bass <i>vs.</i> Stephens <i>et al.</i>	573 Graham <i>et al. Neasey vs.</i>	99
Boyd <i>vs.</i> The State.....	194 Greenwood & Co. Wright <i>vs.</i>	418
Brady <i>vs.</i> Hardeman & Hamilton.....	67 Greenway Bro's & Co. Waters <i>vs.</i>	592
Branan <i>vs.</i> May.....	136 Gresham <i>vs.</i> Pyron.....	263
Brown, Clayton <i>vs.</i>	217 Griffin <i>vs.</i> Stamper and another.....	108
Buckler & Short, Kellogg & Co. <i>vs.</i>	187 Griffin <i>et al. vs.</i> The Justices, &c.....	96
Burney <i>rs.</i> Speer and another.....	223 H.	
C.	Hammond <i>vs.</i> Stevall.....	491
Garey, assignee, McDougald, adm'r, <i>rs.</i>	185 Hamrick <i>et al. vs.</i> Rouse <i>et al.</i>	56
Carhart Bro's & Co., Freeman & Benson <i>vs.</i>	348 Hardeman & Hamilton, Brady <i>vs.</i>	67
Causey & Oslin <i>vs.</i> Miller.....	475 Hardy, Norwood <i>vs.</i>	595
Clark <i>vs.</i> Clark.....	485 Harrison, adm'r, Yonge, assignee, <i>vs.</i>	30
Clayton <i>vs.</i> Brown.....	217 Haynes <i>vs.</i> The State.....	465
Clopton <i>et al.</i> Redd <i>et al. vs.</i>	230 Herndon, Baker, Wilcox & Co. <i>vs.</i>	568
Clements <i>vs.</i> Malohey.....	289 Hestef <i>vs.</i> The State.....	130
Cochran <i>et al.</i> Rawson <i>rs.</i>	80 Hightower, Thornton <i>et al. vs.</i>	1
Cook, Walker <i>et al. vs.</i>	126 Hodges <i>vs.</i> Myers, Snydam & Co.	292
Collier, Molynaux <i>vs.</i>	46 Hollifield, adm'r, <i>et al. vs.</i> Stell.....	280
Comstock & Bro. Allen <i>rs.</i>	554 Howell, Wood <i>vs.</i>	495
Conklin & Co. Miller <i>et al. vs.</i>	430 Hunter <i>et al. Walker, ex'r, vs.</i>	364
Cooper <i>vs.</i> The State.....	437 Hunter, adm'r, &c. <i>vs.</i> Stembridge.....	243
Corry, adm'r, <i>vs.</i> Tompkins.....	361 J.	
Couch <i>vs.</i> Turner <i>et al.</i>	48 James <i>vs.</i> The Trustees of Mercer	
Cox <i>vs.</i> The Mayor, &c. Griffin.....	249 University.....	515
Creamer & Graham <i>vs.</i> Shannon.....	65 Johnson <i>vs.</i> Mitchell.....	593
Crow, Swift <i>vs.</i>	609 Johnson, adm'r, &c. <i>vs.</i> Worthy.....	420
Crozier, adm'r Dunn <i>vs.</i>	70 Johnson, Ordinary, Abbott, relator,	
Curry <i>vs.</i> Gaunden <i>et al.</i>	72 <i>vs.</i>	179
D.	K.	
Dacey <i>vs.</i> The State.....	439 Keaton <i>et al. vs.</i> The Gov. for the	
Digrell, Suellings <i>vs.</i>	use, &c.....	228
Davis and another <i>vs.</i> The Central R. R. & B'kg Co.	323 Kellogg & Co. Buckler & Short <i>vs.</i>	187
Davis <i>et al.</i> Shockley <i>vs.</i>	175 Kerley <i>vs.</i> Richardson.....	602
Davis <i>et al.</i> Shockley <i>vs.</i>	177 Kinsey <i>vs.</i> Sensbough.....	540
Dinkins <i>vs.</i> Moore <i>et al.</i>	Knight, pro. ami <i>vs.</i> Hardeman <i>et al.</i>	253
Debbs <i>et al. vs.</i> The Justices, &c.....	62 L.	
	Lewis <i>vs.</i> Allen & Leak.....	300

TABLE OF CASES.

M.		
Maddox and Wife, McDougald <i>et al.</i>	Sensbough, Kinsey <i>vs.</i>	540
<i>vs.</i>	Shackelford, Selman & Co. <i>vs.</i>	615
Mahone <i>vs.</i> The Central Bank.	52 Shannon, Creamer & Graham <i>vs.</i>	65
Maloney, adm'r, Clements <i>vs.</i>	111 Shannon <i>vs.</i> Roosevelt, Hyde &	.
Mann <i>et al.</i> Strawbridge <i>vs.</i>	289 Clark	88
Matthews, Reevea <i>vs.</i>	454 Sharp <i>vs.</i> The State	290
Matthews, Reevea <i>vs.</i>	449 Shockley <i>vs.</i> Davis <i>et al.</i>	175
Matthews <i>et al.</i> <i>vs.</i> Stanford <i>et al.</i>	543 Shockley <i>vs.</i> Davis <i>et al.</i>	177
May, Brannan <i>vs.</i>	136 Shorter <i>et al.</i> Tucker <i>et al.</i> <i>vs.</i>	620
McAllister <i>vs.</i> The State	618 Shropshire & Hawkins <i>vs.</i> Steven-	
McDougald <i>et al.</i> <i>vs.</i> Maddox and	son	622
Wife	52 Stayton, Russell <i>vs.</i>	277
McDougald, adm'x, <i>vs.</i> Carey, as-	Smith, Watkins, Chappell & Co. <i>vs.</i>	68
signee	185 Smith <i>vs.</i> The State	462
McGuire's Children, Woods <i>vs.</i>	361 Snellings <i>vs.</i> Darrell	141
McGuire's Children, Woods <i>vs.</i>	303 Solomons, Rogers <i>vs.</i>	598
McGrawn <i>vs.</i> McGrawn	234 Speer and another, Burney <i>vs.</i>	223
McGuffie <i>vs.</i> The State	497 Stamper and another, Griffin <i>vs.</i>	106
McRorey <i>et al.</i> Pryor <i>et al.</i> <i>vs.</i>	444 Stanford <i>et al.</i> Matthews <i>et al.</i> <i>vs.</i>	543
Mercer <i>vs.</i> The State	146 Stembridge <i>et al.</i> Hunter, adm'r, <i>vs.</i>	243
Millor, Ceasey & Osbin <i>vs.</i>	435 Stell, Hollifield, adm'r, <i>et al.</i> <i>vs.</i>	280
Miller <i>et al.</i> <i>vs.</i> Conklin & Co.	430 Stevens <i>et al.</i> Bass <i>vs.</i>	572
Miller <i>vs.</i> Saunders <i>et al.</i>	92 Stevenson, Shropshire & Hawkins	622
Mitchell <i>vs.</i> Pyron	416 Stovall, Hammond <i>vs.</i>	491
Mitchell, Printup <i>vs.</i>	558 Strawbridge <i>vs.</i> Maan <i>et al.</i>	454
Mitchell <i>vs.</i> The Rome Br. R. R. &	Strohecker, Barnea <i>vs.</i>	349
S. Co.	574 Swift <i>vs.</i> Crew	600
Mitchell, Johnson <i>vs.</i>	593 T.	.
Molyneux <i>et al.</i> <i>vs.</i> Collier	46 Taylor <i>vs.</i> The Gov. &c.	521
Moore <i>et al.</i> Dinkins <i>vs.</i>	62 Terry <i>vs.</i> The State	204
Myers, Suydam & Co. Hodges <i>vs.</i>	292 Thornton <i>et al.</i> <i>vs.</i> Hightower	1
N.	Tigner, Tompkins <i>vs.</i>	103
Nichols, Hannahan <i>vs.</i>	77 Tompkins <i>vs.</i> Tigner	103
Norwood, Hardy <i>et al.</i> <i>vs.</i>	595 Tompkins <i>vs.</i> The State	856
O.	Tompkins, Corry, adm'r, <i>vs.</i>	351
Osborne <i>vs.</i> The Ordinary, &c. for	Towns, Everett <i>et al.</i> ex'tg, <i>vs.</i>	18
use, &c.	123 Tuggee, adm'r, <i>vs.</i> Wilkinson	99
P.	Tucker <i>et al.</i> <i>vs.</i> Shorter <i>et al.</i>	630
Paxson <i>vs.</i> Bailey	660 Turner <i>et al.</i> Couch <i>vs.</i>	489
Phillips <i>vs.</i> The State	459 The Central Bank <i>vs.</i> Mahone	111
Printup <i>vs.</i> Mitchell	558 The Central Bank <i>vs.</i> Williams	.
Pryor <i>et al.</i> <i>vs.</i> McRorey <i>et al.</i>	444 adm'r	193
Pyron, Mitchell <i>vs.</i>	416 The Central R. R. & Bk'g Co. Davis	.
Pyron, Gresham <i>vs.</i>	268 and another <i>vs.</i>	323
R.	The Gov. for use, &c. Keaton <i>et al.</i>	.
Rawson <i>vs.</i> Cochran <i>et al.</i>	<i>vs.</i>	278
Redd <i>et al.</i> <i>vs.</i> Clopton <i>et al.</i>	The Gov. &c. Taylor <i>vs.</i>	594
Rootes <i>vs.</i> Matthews	449 The Justices, &c. Debb <i>et al.</i> <i>vs.</i>	594
Richardson, Kerley <i>vs.</i>	662 The Justices, &c. Griffin <i>vs.</i>	26
Robison <i>vs.</i> Banks	211 The Mayor, &c. Cox <i>vs.</i>	249
Rogers <i>vs.</i> Solomons	598 The Ordinary, &c. for use, &c. Os-	
Roseberry <i>vs.</i> Roseberry	139 borne <i>vs.</i>	323
Roosevelt, Hyde & Clark, Shannon	The Rome Br. R. R. & Co. Mitch-	
<i>vs.</i>	ell <i>vs.</i>	574
Rouse <i>et al.</i> Hawrick <i>et al.</i> <i>vs.</i>	66 The Trustees, &c. James <i>vs.</i>	515
Russell <i>vs.</i> Stayton	277 The State <i>et al.</i> &c. <i>vs.</i> Woody <i>et al.</i>	612
Russell, Wade <i>et al.</i> <i>vs.</i>	The State, Boyd <i>vs.</i>	194
S.	The State, Cooper <i>vs.</i>	437
Sanders <i>et al.</i> Miller <i>vs.</i>	62 The State, Danny <i>vs.</i>	439
Selman & Co. <i>vs.</i> Shackelford	615 The State, Haynes <i>vs.</i>	465

TABLE OF CASES.

VIL

The State, Hester <i>vs.</i>139	Welborn <i>vs.</i> Weaver <i>et al.</i>267	
The State, McAllister <i>vs.</i>418	Wells <i>vs.</i> Walker.....547	
The State, McGuffie <i>vs.</i>497	White <i>vs.</i> Wallen.....106	
The State, Mercer <i>vs.</i>146	Wilkinson, Tagg, adm'r, <i>vs.</i>99	
The State, Phillips <i>vs.</i>459	Williams <i>et al. vs.</i> Allen, ex'r.....81	
The State, Sharp <i>vs.</i>290	Williams, adm'r, The Central B'k <i>vs.</i>196	
The State, Smith <i>vs.</i>462	Woody <i>et al. vs.</i> The State <i>et al. ex.</i>	
The State, Terry <i>vs.</i>264	<i>vs.</i>612	
The State, Tompkins <i>vs.</i>356	Woods <i>vs.</i> Woods.....293	
V.		
Vessey <i>vs.</i> Graham <i>et al.</i>98	Woods and another <i>vs.</i> McGuire's Children	
W.		
Wade <i>et al. vs.</i> Russell.....425	Woods and another <i>vs.</i> McGuire's Children	
Walker <i>vs.</i> Wells.....547	Woods <i>vs.</i> Howell.....495	
Walker, ex'r, <i>vs.</i> Hunter <i>et al.</i>364	Worthey, Johnson, adm'r, <i>vs.</i>420	
Walker <i>et al. vs.</i> Cook.....128	Wright <i>vs.</i> Greenwood & Co.....419	
Walker, White <i>vs.</i>106	Y.	
Warren and another, Gilmer <i>vs.</i>426	Yonge, assignee, <i>vs.</i> Harrison, adm'r.....30	
Watres <i>vs.</i> Greenway Bro's & Co....592	Yonge, superintendent, Down and another <i>vs.</i>	
Watkins, Chappell & Co. <i>vs.</i> Smith...68	295	
Weaver <i>et al. vs.</i> Welborn <i>vs.</i>267		



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT COLUMBUS,
JANUARY TERM, 1855.

Present—JOSEPH H. LUMPKIN,
EBENEZER STARNES, } *Judges.*
HENRY L. BENNING,

No. 1.—DOZIER THORNTON and others, plaintiffs in error, *vs.*
DANIEL HIGHTOWER, defendant in error.

[1.] At May Term, 1852, an order was granted by the Judge of the Superior Court of Muscogee County, allowing T to amend his bill in Equity, then pending in Court; which order required the defendants to appear and answer said amendment, on or before the first day of the next term, with the liberty of pleading or demurring, or doing both. The next term commenced session on the first Monday in November. Neither plea, nor demurrer, nor answer to the bill, as amended, was then filed; but on the 22d day of December, (the Court being until that time in session,) when the complainant was about moving in the cause, the defendants proposed to dismiss the order granted at May Term, 1852, on various grounds, alleging irregularity and insufficiency in Law: *Held*, that these objections came too late; that they should have been presented, if at all, at the commencement of the term, when the defendants were called on to plead, answer or demur, &c., and that any other practice would allow unfair advantages to be taken, and might be productive of improper delays.

[2.] After such delay, it was proper for the Court to over-rule a motion by the defendants, made on said 22d of December, to be allowed to demur, plead and answer to said bill, as amended, *instanter*.

[3.] In some cases, a complainant may proceed against a portion of many defendants of equal liability; as where the parties liable are very numerous, and where those sued may bear their proportion of the loss, as well as if

Thornton *et al.* vs. Hightower.

all interested were before the Court, and suffer no injustice thereby—there a bill may be filed against a portion of them, to compel payment of their aliquot shares.

[4.] Though defendants to a bill in Equity be in fault in not filing answer in time, and the Court is proceeding to take the bill *pro confesso* against them; yet, if there be then excuses offered to purge the default or contempt, and which present a reasonable ground of indulgence, (unless the delay has been extravagantly long,) the Chancellor should allow the answers to come in upon such terms as he may deem it his duty to prescribe—requiring to see the answers proposed to be put in, in order that he may judge of their propriety, and not putting the complainant to the peril of just such an answer as at that late moment the defendants may think proper to submit.

In Equity, in Muscogee Superior Court. Decision by Judge IVERSON, at November Term, 1852.

At the May Term, 1852, the following order was granted in this cause:

DANIEL HIGHTOWER
vs.
DOZIER THORNTON, *et al.* } Bill &c.

The Court having, at May Term, 1851, granted an order allowing the complainants to make certain amendments to said bill, and directed the manner in which service of the same should be perfected on the defendants to said bill, who had not appeared and answered the same, and the Court being now of the opinion that so much of the said order as directed the mode of said service on said defendants, was improvidentially granted: It is here, now, ordered, that that portion of said order, in regard to the manner of serving said defendants, be re-called and set aside. And the said complainant being desirous of withdrawing his waiver of the answer of certain defendants, as expressed in said order: *It is hereby ordered*, that said complainant withdraws his said waiver; that all the defendants to said bill, or their Counsel, be served with a copy of all the amendments made to said bill, and a copy of this order, sixty days before the next term of this Court, if to be found in this State; if not, by a publication, once a week, in one of the

Thornton *et al.* vs. Hightower.

public Gazettes in the City of Columbus, for two months before the next term of this Court, to wit: Daniel Hightower *vs.* Dozier Thornton and others, (the names of those to be served to be inserted.) Bill, &c., in Muscogee Superior Court, to compel the defendants, as stockholders of the Planters' & Mechanics' Bank of Columbus, to pay up the unpaid stock in their hands: *It is ordered*, that the said defendants appear and answer said bill, on or before the first day of the next term of this Court, with the liberty of pleading or demurring thereto, or both, if they think proper. *It is farther ordered*, that all the defendants to said bill appear and answer said amendments, on or before the first day of the next term of this Court, with the liberty also of pleading or demurring, or of doing both, to the same, at the time aforesaid."

Counsel for defendants were in Court when this order was passed, and resisted the passing thereof.

At November Term, 1852, Counsel for defendants moved the Court to set aside these orders, as improvidently granted, on the following grounds:

1st. Said orders are uncertain and insufficient, as to the names of the defendants to said bill.

2d. Because two of the defendants to said bill were, at the time of the passing of said order, dead, to-wit: David P. Hillhouse and Abraham Key, and their representatives, at that time, had not been made parties.

3d. Because the defendants are given no day in Court, in which to demur, alone, to said amendment.

4th. Because said order for service of said amendment, by publication, is erroneous and contrary to the Statute in relation to the service of amendments.

5th. Because said orders are improperly granted in this, that at the time of the granting of said orders and each of them, said complainant had not, in truth and in fact, amended his bill, and had not filed any amendments in said cause, making said A. B. Ragan, the assignee of said Planters' and Mechanics' Bank of Columbus, a party defendant to said bill.

Thornton *et al.* vs. Hightower.

6th. Because, if the complainant had made such amendment, the same was irregular and illegal, inasmuch as defendants had answered said original bill, before such amendment; and the same being founded on matters and things accruing after the filing of said original bill, as is shown by said amendment—the same could be engrafted on said bill, only by a supplemental bill.

7th. Because the orders are irregular, insufficient and improvident, as appears by an inspection thereof.

The Court refused the motion of defendants' Counsel, and exceptions were filed thereto.

Defendants then asked leave to demur, plead and answer to the Bill, as amended, confining themselves, in the demurrer, to the amendment alone; on the ground that the same could be allowed only on supplemental bill. And to plead—(the pleas being already filed)—

1st. That Robert B. Alexander was the proper party complainant; that Ragan was improperly made a party defendant, and divers other things, which appear in said pleas, and Ann E. McDougald pleading also the several other pleas, and *plaen administravit praeter, &c.*

2d. That there were numerous stockholders of said bank, owning numerous shares of said bank, solvent and within the jurisdiction of the Court, of equal liability with these defendants, whatever their liability may be per share, not made defendants to the bill, and which complainants could have made, and can make defendants to said bill, and who are material and necessary parties defendants to said bill.

And for answers, the defendants offered, fully, to answer the amendments *instanter*; and in fact, some of the defendants had filed their answers in the Clerk's office, but without permission of the Court. The Court refused to allow the defendants as curing their default thus to demur, or demur and plead, or demur and answer, because the defendants were in default in not filing the same on or before the first day of the term, as by said order required, and had not so filed them until the case

Thornton et al. vs. Hightower.

was called in its order for hearing. To which ruling of the Court, said defendants, by their Counsel, excepted.

The Court then directed the complainant Solicitor to take the order *pro confesso*, as to the amendments to said bill. The complainant Solicitor insisting upon his right to take the whole bill as amended as confessed, the Court granted time until the next morning, for him to produce authority sustaining said motion; and on the following morning, at the opening of Court, the complainant's Solicitor was called upon by the Court to proceed with the reading of the authorities, when the Solicitors for defendants arose and appealed to the discretion of the Court, to allow them reasonable and further time in which to file their answers and pleas, or answers alone, by enlarging the order of the May Term, 1852, in that regard, and offered to the Court, in excuse for their default, and as purging them from all contempt—

The statement of Col. H. Holt, who stated that he was original leading Counsel for a large portion of said defendants, and on whom had devolved the principal preparation of the defence, from the commencement of the case; that it was not and had not been his purpose, or those he represented, to delay the case; that since the first week in August last, until the last week of the present term of this Court, he had been sick, and had not been able, and had not prepared this or his numerous other cases in this Court; while he would not say that these particular cases had not been neglected, by reason of his indisposition, he would say that these and all his other cases had been neglected; and he regretted to add, that his clients had suffered most materially.

B. Hill, Esq. also of Counsel for two of the defendants, to-wit: Alexander J. Robinson and Dozier Thornton, stated, that although thus employed, Col. Holt was employed for the same defendants; yet, he, Hill, was not expected to aid in the preparation of these cases in vacation, as he was necessarily absent; that when he first came to the Court, during the present session or term, he had been informed, by those on whose information he relied, that complainant's Solicitor had, the week

Thornton *et al.* vs. Hightower.

before his arrival, announced that he should not take any steps in these Equity bank cases, further than to make parties thereto, as to the representative of deceased defendants, which had proved true of one of the cases—that of Carey, assignee, vs. Hoxey, but not so of these cases; that when, at the last term, the order was taken in this case, he was fully of the opinion and belief that said order allowed a demurrer alone, at this term of the Court; and consequently, further time to plead and answer, especially as on motion of defendants, at the time said order was passed, "not demurring alone" were, by the Court, stricken from said order, and he had informed his clients of his, said Hill's, understanding of the legal effect of said order.

Alexander J. Robinson, in person, testified that he had applied to Judge Sturgis, one of his original Counsel, as to the preparation of his defence in vacation, who informed him that nothing was necessary to be done in vacation; and hearing of the sickness of Col. Holt, his other resident Counsel, whose sickness was known to him, and the absence of Judge Sturgis at Washington, he had not employed other Counsel to prepare his defence.

Henry J. Devón, Counsel for Ann E. McDougald, administratrix of Daniel McDougald, deceased, (as was also Col. Holt Counsel for her) stated, in his place, that he endeavored to obtain the papers in this and other cases, in vacation, in which Mrs. McDougald was a party, in order to see to the preparation of her defence before the present term of the Court; that he applied to the Clerk for all the papers in which she was a party, who informed him that said papers were not in office, but were in the possession of complainant's Solicitor; he then applied, several times, to Mr. Stokes, the co-partner of Mr. Dougherty, who informed him that Mr. D. was absent, and that he could get none of the papers until Mr. Dougherty returned; and that he was unable to procure them until during the present term of this Court.

Martin J. Crawford, Esq. for himself, as defendant, stated that in September last, Mr. Stokes had called on him and

Thornton *et al.* vs. Hightower.

asked him to acknowledge service on the amendment, the order being absent, stating to him that it was only an old amendment, granted several terms ago, and a copy of which he, defendant, already had—and asked defendant to accept service and waive being served with a copy; and defendant did so, and never knew the contents of said order, as to the peremptory requisition of the same, to answer said bill on or before the first day of this term; nor was he informed, by any one, about it, until within the last three days; so soon as he was informed, he promptly answered said amendment and filed said answer in the Clerk's office, but without leave of said Court to do so.

Defendants further proposed to answer said bill, in such manner and within such time as to cause no delay to complainants; that said complainant might, so far as defendants were concerned, set said cause down for trial at the next term of said Court, if he was, as to said amendment, and in reference to other defendants, (not served with it,) in a condition to do so; and because, in fact, it would not delay complainant, as he had parties, to-wit: the representatives of Key and Hillhouse, not served with said amendment; and the rule for time, to perfect service of said amendments, would have to be enlarged, as to those defendants.

After considering said motion, said Court refused the same as to each and all of said defendants, and to which decisions of said Court, refusing said motion, said defendants, by their Counsel, then and there excepted.

Complainant had, previously to the above stated motion of defendants, moved to take said bill as amended, *pro confesso*, as to the said defendants, served with a copy of said amendment, under said order of May Term, 1852, and now insisted on the granting of said motion by the Court; and as preliminary thereto, was called upon to prove service thereof, and for the purpose, produced a copy of said amendment, and a certified copy of said order of May Term, 1852, thereto attached, and with this entry thereon:

Thornton *et al.* vs. Hightower.

"STATE OF GEORGIA—COUNTY OF RANDOLPH:

Served the defendant, personally, with a copy of the within original:

September 5, 1852:

(Signed) WASHINGTON JOYCE, Sheriff."

And claimed the entry of said Sheriff on said amendment and copy order, as evidence of service thereof, on William Taylor, one of said defendants; to which defendant's Counsel objected, as insufficient evidence of that fact, which objection the Court over-ruled; to which ruling of the Court the defendants, by their Counsel, excepted. Complainant then exhibited a copy of said amendment, with the Clerk's certified copies of the orders thereto attached, on which was an acknowledgment of service, signed Martin J. Crawford, for himself and co-executors; and defendants objected that this was not sufficient service as to said co-executors, as said Crawford did not, in such acknowledgment, show himself to be the Solicitor of said co-executors, which objection the Court overruled. To which ruling the defendants excepted.

The complainant then introduced several copies of the Columbus *Enquirer*, a newspaper published weekly in the City of Columbus, in said county of Muscogee—showed by said papers that a copy of the said order, with the name of Daniel Hightower, complainant, *vs.* Dozier Thornton, James M. Foster and James Slayton and others were stated as defendants; and if the defendants, except Thornton, were included therein, it was in the designation "and others," and not by their several names. Complainant proved, by said paper, that a copy of said order, with defendants named therein, as aforesaid, had been published once a week for two months, to-wit: in a paper issued on the 7th day of September, 1852, and in one issue on the 2d November, 1852, and in each weekly issue between that time, and relied on said publication as evidence that Foster Slayton and Greenwood had been legally and sufficiently served with said amendments. Defendants' Counsel objected to the sufficiency of said service, and to the sufficiency of the

Thomson et al. vs. Hightower.

evidence thereof, upon the ground that the names of said defendants were not sufficiently named in said caption, and because said publication had only been made two months, which objections were over-ruled by the Court. To which ruling and decisions, the defendants, by their Counsel, excepted.

Defendants showed for cause why complainant's Counsel should not take the bills as amended, *pro confesso*, as to the defendants, (other than the representatives of Key and Hillhouse, not served; and, as against whom complainant did not ask said order,) in addition to the foregoing reasons, already stated, the following:

1st. Because Key & Hillhouse were then dead, (and it was then and there admitted by complainant's Counsel, that Hillhouse had been dead two and a half years, and Key one and a half years,) and that the representatives of Key and Hillhouse not having been served with said amendments, the bill, as amended, was not in a condition to be taken *pro confesso*, as to any defendants.

2d. Because the order should be (inasmuch as the amendment was only as to parties, and not materially affecting the main gist of the action set forth and charged against defendants in the original bill, and as defendants had answered the original bill as aforesaid,) said order (if complainant could move at all, which defendants deny,) is not in such condition, either as to making, filing or serving thereof, as will enable the complainant to take the bill as amended *pro confesso*, as to Regan or any of the defendants; which objections the Court overruled, and granted the order asked for by complainant, taking the bill *pro confesso*, as to all of the defendants except the representatives of Key and Hillhouse, deceased. To which decision of the Court, the defendants, by their Counsel, excepted:

Complainants then moved for further time to serve the representatives of Key and Hillhouse, with the amendments to said bill. The Court granted the motion and ordered service thereof, and that said parties should, on or before the 1st day

Thornton et al. vs. Hightower.

of the next term of the Court answer the amendments. To which decision of the Court, granting the order, defendants, by their Counsel, excepted. Defendants, by their Counsel, moved to dismiss said bill, on the following grounds:

1st. That complainant had not used due diligence in the preparing and speeding said case and in setting the same down for trial—as more than four terms had elapsed since the filing of said bill, in which the Court had been held, and in which complainant could have taken steps to speed said case, and taken steps to set the same down for trial, and complainant had not, nor had said Court, set said case down for trial, within the time limited by Statute for that purpose.

2d. Because said bill has never been, since its having been filed as aforesaid, docketed and called in a legal and proper manner on the equity docket of said Court, the same having been docketed and called (if at all, which defendants deny,) in this manner, and in this manner only—"Daniel Hightower vs. Dozier Thornton et al. Bill for Discovery, Relief and Contribution."

3. Because all the interlocutory decrees and orders, taken by said complainants in said case, (if taken at all in said case, which defendants deny,) are ambiguous, uncertain and insufficient, as to the case to which they refer, and as to the defendants to be bound thereby, said order being headed in this way and no other—"Daniel Hightower vs. Dozier Thornton et al. Bill," &c. and said orders will be no sufficient protection to these defendants, as to the facts of said cases therein recited. Which motion the Court over-ruled, and to which decision, defendants, by their Counsel, excepted.

And upon these several exceptions, error has been assigned.

Judge BENNING having been of Counsel in this case, did not preside.

B. HALE and H. HOLT, for plaintiff in error.

DOUGHERTY, for defendant in error.

Thornton et al. vs. Hightower.

By the Court.—STARNES, J. delivering the opinion.

At May Term, 1852, an order was granted by the Superior Court of Muscogee County, in reference to amendments of the bill filed by the defendant in error, (the complainant in the Court below) against the plaintiffs in error. At November Term of said Court thereafter, but as late as the 22d day of December, to which time the Court had continued in session, the defendants to said bill moved the Court to set aside said order on various grounds.

[1.] These grounds were; in our opinion, rightly over-ruled. They were in the nature of technical objections, and came too late. If good at all, they should have been made at an earlier period. The Court commenced its session on the first Monday in November, and it was not until the 22d day of December thereafter, when the complainant was about moving in his case, that these objections were made to an order which had been taken at a previous term of the Court. The defendants were required, by that order, to appear and answer said amendments, on or before the first day of the next term of the Court, with the liberty, also, of pleading, or demurring, or of doing both. That was the time at which they should have presented these objections, if they desired to rely upon them—the time at which they were called upon to answer; when the complainant would have had the earliest notice of their objections; and if some or all of them had been sustained, would have had the whole term in which to shape his course accordingly. Any other practice would allow unfair advantages to be taken, and might be productive of improper delays.

[2.] The defendants then asked leave to demur, plead and answer to said amended bill, *instanter*. And they presented certain pleas to the effect: 1. That the matter contained in said amendments should have been presented in the shape and form of a supplemental bill. 2. That A. B. Ragan was improperly made a defendant by said amendments, and should have been a party complainant to said bill. 3. That there

Thornton et al. vs. Hightower.

were numerous stockholders of said bank, solvent and within the jurisdiction of the Court, of equal liability with those made defendants, who had not been made parties, and who were necessary parties.

The leave thus asked was refused by the Court; and properly refused, in our opinion. As the case then stood in Court, with the order of the last term in force, requiring the defendants to answer, plead or demur on the first day of the next term, with the fact before the Court, that neither plea, demurrer nor answer had been filed in pursuance of the order, and with no excuse rendered therefor, the parties appeared before the Court in default, if not in contempt, and they had no right to the indulgence or privilege which they craved. It would have been a very bad practice, indeed, which accorded it to them.

[3.] Touching one of these pleas, we desire to make a few observations which may possibly save trouble hereafter.

It was insisted that all the stockholders of said bank, solvent and within the jurisdiction of said Court, of equal liability with said defendants, per share, should have been made defendants to said bill; and that the cause could not proceed without them.

This is just one of the cases where, according to well settled rules, a complainant may proceed against a portion of many defendants of equal liability. Such is the doctrine held in 2 Eq. C. Abr. 166, and to the following effect: "Where the parties liable to the demand have been very numerous, the Court have, in like manner, permitted a bill to be filed against a few of them, to compel the payment of their aliquot shares, without bringing the others before it. Thus, where fifty persons join together to form a bank, and to procure an Act of Parliament to establish and settle it, and were at equal charges, and about two hundred and fifty subscribed to raise a fund, but the speculation turned out unfavorably, whereby a loss of about £6000 was sustained by the first proprietors, who thereupon exhibited their bill against sixteen of the two hundred and fifty subscribers, to compel them to bear their proportion of the loss; it

Thornton et al. vs. Hightower.

was moved that the bill should abate for want of parties; but over-ruled, for, the plaintiffs duly prayed that the defendants might bear their proportion of the loss, which would appear before the master as well as if all the two hundred and fifty subscribers were there, and so, it could be no prejudice to those defendants." See, also, to the same effect, 1 *Eq. C. Abr.* 73. *Do.* 165. 4 *Dan. Ch. Pr.* 365.

[4.] It appears, by this record, that no order was taken by the Court against these defendants, on the day in question, but on the ensuing day they appeared in Court, by their Counsel, and presented excuses for their default, by which they sought to parge themselves of the imputed contempt. And then they asked leave to plead, answer or denfur to said amendments, and that the bill might not be taken *pro confesso* against them. These excuses were not deemed sufficient; the permission was refused, and the Court proceeded to require proof of service, in order that the bill might be taken *pro confesso* against all defendants served.

To ascertain whether or not this ruling of the Court was correct, let us look a little into the character of this proceeding, to take a bill *pro confesso*. The object of such proceeding, in a Court of Equity, is to place the complainant in a situation by which he shall not lose his remedy for want of the answer, for which he is dependent upon the conscience of the defendant. It may be said to be used by way of punishment for contempt; but it is not the peculiar punishment for such contempt—attachment and committal to prison is that remedy. But even these have direct reference to the extraction or obtaining of an answer, as that which is the thing needful to the justice of the case. Accordingly, where the accurate and regular forms of Chancery practice are pursued, such as were of force in England at the time of our Adopting Statute, the defendant who appears and refuses to answer is first committed for the contempt; and if he persists in refusing, his property, real and personal, may be sequestrated. In the meantime, he will be brought to the bar and admonished of the peril of persevering,

Thornton *et al. vs. Hightower.*

and if he still refuse to answer, the bill will be taken as *confessed* against him. (1 Hart. Ch. Pr. 203. 2 Ch. Ca. 237.)

Under the rules, as they now stand in England, they having been amended during the reign of *William IV.* the recusant defendant must be first committed for the contempt, to the Fleet prison; he may then be brought to the bar by *habeas corpus*; and if he still persists in his refusal, the Court will then make an order that the bill be taken *pro confesso*. But even after this, the Court may receive the answer. It will not, as matter of course, be a sufficient ground for setting the order aside; "yet, wherever an order of this kind has been made, and the defendant comes in upon any reasonable ground of indulgence, and pays the costs, the Court will attend to his application, unless the delay has been extravagantly long." (*Williams vs. Thompson*, 2 Brow. C. C. 280. 1 Dan. Ch. P. 695.)

We have dwelt on all this, for the purpose of showing that the great point to be gained, where a defendant refuses to answer, is *the answer*; that the efforts of the Court are mainly addressed to this point; that other punishment than that of taking the bill *as confessed*, will first be resorted to, and that even after the order taking the bill *pro confesso* is entered, the defendant will be allowed to file his answer, upon any reasonable ground of indulgence. Now we can spare but few words in order to apply these principles to the case at bar, nor can many words be needed.

We will only add, that under the circumstances of this case, taking into consideration the fact that the Court had not deemed the contumacy of the defendants sufficient to authorize an attachment for contempt, and taking into consideration the excuses which were tendered by the Counsel for the defendants, especially the illness of the leading Counsel, Col. Holt, we think that the Court should have considered this showing as a "reasonable ground of indulgence," so far as to let the answer come in upon it. Still, might the Chancellor have visited an inconvenience or penalty upon the defendants for not having answered. Already had they been rightly refused the privi-

Everett et al. executors vs. Towns.

lege of demurring or pleading to the amendments; and the Chancellor could, and perhaps should, have admitted the answer upon terms; for we are told that when the order is discharged for taking the bill *pro confesso*, the Court will "require to see the answer proposed to be put in, in order that it may form a judgment as to the propriety of it, and will not put the plaintiff to the peril of just such an answer as the defendant shall think proper to give." (*Hearne vs. Ogilvie*, (11 Ves. 77.) In this way, too, the Chancellor could have prevented delay, and have secured to the complainant all the rights of which he would have been possessed, had the answer been filed in time.

Such would have been the substantial justice of this case, in our opinion, and such should have been the direction given to it.

This disposition of the case renders it unnecessary for us to consider the question made upon service, on various defendants, as preliminary to the order which was granted, taking the bill *pro confesso* against them.

Judgment reversed.

No. 2.—T. H. EVERETT et al. executors of James A. Everett, plaintiffs in error, vs. GEORGE W. TOWNS, defendant in error.

[1.] As a general rule, a bill for specific performance, or for what is equivalent to specific performance, will be allowed or not, according to the discretion of the Court. If, therefore, a Court dismisses a bill for specific performance, on the ground that the contract prayed to be performed is not sufficiently proved, and the proof is such as to leave it in doubt whether the contract alleged existed or not, the judgment will not be disturbed by the Supreme Court.

In Equity, in Taylor Superior Court. Tried before Judge CRAWFORD; April Term, 1854.

Everett et al. Ex'r's. vs. Towns.

The executors of James A. Everett filed their bill against George W. Towns, alleging substantially as follows:

"That in the years of 1828 or 1829; their testator purchased of the State of Georgia; among other lots, two certain lots of land, to-wit: lots numbers 263 and 264, situated on or near the Flint river, in first district formerly Muscogee, now Taylor County; containing each two hundred two and a half acres, more or less, now of the value of four thousand dollars, or other large sum; that their testator, after said purchase from the State, and in the life time of testator, paid to the State of Georgia the whole of the purchase money agreed to be paid for said two lots of land, (and took from the State receipts for the purchase money so paid) amounting to the sum of dollars, but that he omitted and neglected to take grants from the State to him for said lots of land, and said Everett never went into the actual possession or occupation of either of said lots of land.

That just before or soon after the death of the said Everett, who had been much afflicted, and in consequence thereof, physically incapacitated from looking after his ordinary business, one George W. Towns, on day , 18—, he then being the Governor of the State, did, under some pretended law or resolution of the Legislature of said State, cause said two lots of land to be advertised and sold; and he fraudulently, by himself, or through the agency of some other person or persons, purchased, or pretended to purchase the said two lots of land, and caused a grant or some other written or printed conveyance to be made and delivered to him for said two lots of land; when said Towns well knew, at the time he so purchased or pretended to purchase said lots, and at the time he caused said grant to issue, that the lots of land had been bought and paid for by their testator; and that one of complainants and others, before the said Towns bought and had said grants issued to himself, informed him of the fact; and he acknowledged that he knew or had been informed that said James A. Everett had purchased said lots and claimed them as his own.

Everett et al. exts, vs. Towns.

That Towns as Governor, on or about the 2nd Sept. 1828, caused to be issued to said James A. Everett; or his executors, grants to lots numbers 297, 242 and 305, in the same county and district that the said lots are situate, and which were bought and paid for at the same time that lots numbers 263 and 264 were, and which Towns well knew.

That Towns confessed that he knew before he purchased and had said grant so issued to himself, that Everett claimed said lots of land as his own, and Towns ought to purchase the same of complainants some time before he as, Governor, caused the same to be sold as the lands of the State.

That the lots numbers 263 and 264 are situate not far from the plantation of Towns, and lie between, or nearly so, of his plantation and the Flint river, and would be peculiarly valuable to him from the proximity to his lands and farm and the branch of the South Western Rail Road leading from Fort Valley to Columbus; that when the said James A. Everett so purchased said lands, which lands were sold by the Sheriff of the County of Marion, in which county said lands then lay, under an Act of the Legislature of this State passed in 1827, said Everett paid the said Sheriff the first cash payment required by said act, and took from him the certificate required, shewing said payment, and what was still due—which certificate is lost, or destroyed, or stolen from the archives of the Government—and said Sheriff, who sold said lands, soon thereafter paid to the State said first payment.

That there were only three payments more to be made, in three annual instalments, to wit: one in 1830, one in 1831, and one in 1832; and which payments and instalments were fully paid to the State, constituting the full payment and consideration for said two lots of land, as will more fully appear by reference to the receipts of the State by the Comptroller, as follows:

COMPTROLLER GENERAL'S OFFICE,
Georgia, Milledgeville, 24th April, 1830.

Received of James A. Everett, by Lenoy M. Wiley, the

Everett et al. vs. Towns.

sum of one hundred and thirty-three dollars and ninety-four cents, for the first installment on lots Nos. 297, 305, 242, 243, 221, 222, 263, and 264, in the first district of Muscogee.	
Principal.....	\$132 85
Interest.....	1 09
	• \$133 94.

As per certificate No. 211 of Hines Holt, Treasurer.

T. B. HOWARD, Compt Gen'l.

No. 95.

COMPTROLLER GENERAL'S OFFICE,
Georgia, Milledgeville, 12th Jan., 1831.

Received of James A. Everett, by Peter R. Green, Esq., the sum of ninety dollars and thirty-five cents, the second instalment for lots Nos. 242, 243, 263, 264, 297 and 305, all in the first district of Muscogee County, as per certificate No. 95 of Hines Holt, Esq., Treasurer.

T. B. HOWARD, Compt. Gen'l.

No. 145.

COMPTROLLER GENERAL'S OFFICE,
Georgia, Milledgeville, 20th Jan., 1832.

Received of James A. Everett, by Peter B. Green, Esq., the sum of eighty-nine dollars and thirty-six cents, the third instalment for lots Nos. 242, 243, and 263, 264, 297 and 305, all in the first district of Muscogee County--\$89³⁶, as per certificate No. 145 of John Williams, Esq., Treasurer.

T. B. HOWARD, Compt Gen'l.

That these grants to Towns were obtained thus, fraudulently, and were consequently void.

The prayer was that they might be delivered up to be cancelled.

George W. Towns answered the bill in substance as follows:

He knows nothing of the alleged purchase of the two lots of land, to-wit: numbers 263 and 264 in the first district of origin-

Everett et al. ex'rs, vs. Towns.

ally Muscogee, now Taylor County, by James A. Everett in his life time, and from all he has been informed in reference to the same, he does not believe that Everett ever did purchase the same from the State of Georgia. He admits that the two lots of land are worth four thousand dollars.

He has no knowledge of Everett, in his life time, having purchased said land, and of his having paid to the State of Georgia the purchase money agreed to be paid for the same; and his information derived from Everett himself, in his life time, was, that Everett was not a purchaser of the same; and his information as to Everett having paid the purchase money for said land to the State, from an examination of the proper records and offices at the seat of Government, was and is, that Everett never paid the purchase money, or any part of it, to the State for said two lots of land, in performance of any contract made by him with the State; and he does not believe that Everett ever did make a contract with the State for the purchase of the same, or ever paid any money to the State in performance of any contract for the purchase of the same.

He admits that grants from the State never issued to Everett, and he believes they never ought to have issued to him; and that Everett never entered into the possession of the same.

To the statement, that at the time Everett purchased said lands, he paid to said commissioners one fifth of the purchase money required to be paid, and took from them, in writing, signed by them according to the requirements of the law, certificates that he had so purchased said lots of land and paid the part required to be paid, he has no knowledge of the facts, or either of them; and does not believe that Everett ever paid the fifth part of the alleged purchase money to the commissioners; and does not believe the commissioners ever issued to Everett any certificate, in writing or otherwise, that he had so purchased the lands, and paid the part required by the law;

He does not believe the same is in any of the departments of the State Government; nor does he believe the same ever was in existence.

Everett et al. ex'rs, vs. Towns.

He knows nothing of Everett having paid to the State of Ga. the whole amount of the purchase money for said lands. He knows nothing of the payments charged to have been made on the 24th April, 1830, 12th January, 1831, and 20th April, 1832; he knows nothing of the alleged payment of the fourth instalment charged to have been made in the year 1833, and of a receipt being taken for it; but believes that such payment was never made by Everett, nor a receipt given for the same; and does not believe that such receipt was ever lost or mislaid, either by Everett or complainants.

He admits that on the 21st day of December, 1848, he then being Governor of said State, he caused a list of the ungranted fractional lots and undrawn lots of land, as reported to him by the Surveyor General of the State, lying in the county of Monroe, to be sent to the Sheriff of the county as provided for and directed by Act of the Legislature approved December 30, 1847; and after the same was duly advertised, said two lots of land, numbers 263 and 264, among others, were sold by the Sheriff under the provisions of the Act of the Legislature, on the first Tuesday in February, 1849.

Henry J. G. Williams, at the sale aforesaid, became the purchaser of lot number 263, at the price or sum of \$105 00, and Benjamin F. Gullett became the purchaser of lot number 264 at the price or sum of \$550 00; and Williams and Gullett then obtained certificates of the sale of said two lots as required by law, and which certificate to said Gullett was afterwards, to-wit: on the 1st day of March, 1849, duly transferred to defendant; and on the same day Williams transferred the certificate of sale issued to him to defendant.

He admits before the sale of said land he assured Gullett and Williams that if the two lots should be disposed of at a less sum than fifteen hundred dollars, that they would be authorized to buy them, and he would take and pay for them.

That all and singular the statements contained in said Bill, that defendant fraudulently, by himself or other person, purchased said lands are false and untrue, and on the contrary, the conduct of the complainants, or at best, that of one of them,

Everett et al. ex'res, vs. Towns.

to-wit: Adolphus D. Kendrick, at the sale of said lands, as he has been informed and believes, was such as to induce Gulkett and Williams to believe that complainants have no right or interest in or to said two lots of land, or either of them. For he states as matter of information and belief, that Kendrick was present at the sale, and gave no notice of any claim or title to said two lots of land in said James A. Everett in his life-time, and made no objection to the sale, although at that time one Thurston R. Bloom publicly objected to the sale of said two lots, on the ground that he and one Johnson had applied at the proper department of the State Government to grant the same, and that therefore Bloom and Johnson were entitled to the same. Wherefore, defendant says and insists, that the facts herein stated show that complainants have been and are now acting fraudulently, in endeavoring to set up a title which they concealed from the public at the time defendant acquired his title to the lands.

The charge in the bill that he fraudulently caused grants or other evidence of title to be issued to himself, is wholly false and untrue. Upon the very first intimation of claim to said land, by complainants, defendant suspended all further proceedings as to issuing grants and afterwards, at the next session of the General Assembly of said State, the facts in relation to the lands were submitted to the General Assembly in a memorial of defendant, in which he offered to issue the grants to such persons as the General Assembly might direct; and after consideration of the same and the claims of complainants, the Gen. Assembly, by a resolution passed on the 29th day of December, 1849, decided that the grants to said two lots of land should issue to defendant.

The grants did not issue until the 24th day of February, 1851, and in the mean-time the two last installments on each land, amounting in the aggregate to the sum of \$642.50, were paid by defendant, and yet no steps were taken or any thing done by said complainants, to prevent the issuing of said grants. Wherefore, defendant declares that his act in issuing the grants was not fraudulent, but that the same was fairly and bona fide

Everett, et al. ex'rs, vs. Towns.

issued to him in the day and year aforesaid; in accordance with the Act of the General Assembly of 1847, and the resolution of the same as above mentioned. . . .

He utterly and fully denies that he had any notice that Everett had bought or claimed said lands, or either of them, at the time he purchased them. So far from having any such notice, he says that some time in the year 1845, or thereabouts, he applied to some persons residing in the neighborhood of these lands, and especially to Caleb Lisberg, who owned a lot adjoining lot number 268, who were the owners of these lands? and could get no information concerning the owner of owners; and being desirous to purchase lots numbers 268, 263, 264, 279 and 280, and being advised that Everett was the owner of lot number 279; he applied in person to Everett to purchase such of them as he owned, and did purchase from him lots numbers 279 and 280, and at the same time inquired especially if he was the owner of lots numbers 268, 264 and 266, or if he knew who did own them. Everett replied distinctly that he did not own them, or either of them, and did not know who did own them; and afterwards defendant applied to the proper department of the State Government to ascertain who were the owners of lots numbers 269 and 264, and was informed that said last mentioned lots had never been disposed of by the State.

Defendant most positively denies that either of the complainants, or any other person, gave him notice that Everett had bought or claimed said tracts before defendant bought them; and he denies most positively that he ever acknowledged that he knew or had been informed that Everett had bought or claimed said lands before defendant bought them. The first thing he knew of complainants claiming said land was in the fall of the year 1849, when he was informed that the Check Book in the Treasury at Milledgeville showed that Everett had at different times made three payments at the Treasury on and for sundry lots of land; but defendant denies that the certificates found in said Check Book, and which are mentioned in the bill, furnished any notice to him that any specific sum had

Everett et al. ex'm, vs. Towns.

been paid for those particular lots, or that they furnished any notice that the same was paid in pursuance of any contract between Everett and the State for the sale and purchase of said two lots of land.

He does not know or remember what grants were issued to Everett, or his executors, on the 24th of September, 1850, or whether any were issued to the lots in said bill mentioned, that is, lots numbers 297, 242 and 305, but states that said Kendrick, one of the complainants, did purchase lot number 242 at the price of \$460, and number 243 at the price of \$851, (both of which lots are mentioned in the certificates to said amended bill mentioned,) at the same sale that numbers 263 and 264 were bought by said Gullett and Williams.

He most positively denies that he ever confessed, before he purchased said lands, that he knew Everett claimed them; and he also denies that he ever, at any time, sought to purchase the same from complainants, or either of them, and says that all such allegations in complainants' Bill are false and untrue.

That George W. Towns is entitled to grants for fractional lot No. 267 and lots of land Nos. 263 and 264, in the first district of originally Muscogee, now Macon County, under the terms and conditions of the sale at which he became the purchaser of the same, under an Executive order pursuant to an act of the last General Assembly of this State.

On the trial, Wiley Williams, Esq. was introduced by complainants, who avore that he was present at the sale of undrawn square lots of land lying in that part of the County of Muscogee, then Marion. The sale was in 1829. The lands in dispute lie in that section. The sale was made by the Sheriff, in pursuance of the Act of the Legislature. The Surveyor General furnished the Sheriff with a list of the lots which were said to be undrawn lots. Does not recollect any of the numbers, nor that the list furnished by the Surveyor General were all the undrawn lots.

The Sheriff gave certificates to the purchasers of the lots, sold on the payment of the first payment due, and thinks all

Everett, et al. ex's, vs. Towns.

were sold that were in the list furnished the Sheriff. Witness wrote the certificates in blank, and the Sheriff filled them, and gave them to the purchasers; but who were any of the purchasers he does not recollect, it has been so long. He does recollect that the Sheriff did make his return and settlement for said sales, and payment of the moneys received, at the Treasurer's office; or that witness did it for him. He is certain that he was present when the money was paid to the Treasurer of the State, but he cannot recollect the amount paid, nor for what particular lots.

To the best of his recollection, James A. Everett was not at the sale. He does not remember any one of the purchasers on that occasion. Mr. Everett might have had an agent there to bid, and he not remember it. He thinks Mr. Green was there, but whether he bid for Everett he does not remember.

The defendant's Counsel then presented the receipts before referred to, to the witness, and asked him if the signatures thereto were the hand-writing of Howard, the Comptroller General? He answered that he was acquainted with Mr. Howard's hand-writing, having often seen him write, and that the two last receipts, dated in 1831 and 1832, he had no doubt bore the true and proper signature of T. B. Howard, the Comptroller: but that he did not think the signature to the first, dated in 1830, was in the hand-writing of Howard.

On being crossed by complainant's Solicitors, he said it might be his signature; that men did not always write the same: nor could he say that the signature was not put there by a clerk, and by the direction of Howard.

Here complainants announced that they closed, when defendant's Solicitors demurred to the evidence, and moved to dismiss the bill, on the ground that complainants had not, by their proof, made such a case as entitles them to a decree in said cause—

1st. Because complainants had not given in evidence the will of their testator, to prove they were entitled to recover said lands, or to the relation upon which

Everett et al. ex'rs. vs. Towns.

2d. Because they had given no evidence of any contract of purchase of said lands by Everett from the State.

3d. Because they had given no evidence that Towns had notice of any contract of purchase from the State by Everett, before he (Towns) purchased from the State.

On hearing argument, the Court sustained the motion to dismiss on the two last grounds, without deciding the first, and the bill was accordingly dismissed.

This decision is the error assigned.

HUNTER & SCARBOROUGH, for plaintiff in error.

Dr. B. SMITH and B. HILL, for defendant in error.

By the Court.—BENNING, J: delivering the opinion.

[1.] This bill is like a bill for specific performance. It is true the prayer of it is not that the State may perform its contract and make a conveyance of the legal title to the complainants, but it is that the Court may, itself, do what shall serve in place of such a conveyance. The prayer is that the conveyance made by the State to Towns may be cancelled, "and that it may be decreed that the legal title to said lots of land is in the estate of orator's testator." The decree of the Court shall serve for a conveyance—this is the prayer. And the prayer is made to take this extraordinary form, perhaps, from the difficulty which the complainants felt to lie in the way of the ordinary form of bill, and prayer in such cases. The ordinary form requires the person who ought to make the conveyance to be a party to the bill, and also requires him to be decreed to make the conveyance. But in this case, the State is that party, and the State cannot be sued; and if it could be, a judgment against it, rendered by a Court, one of its own creatures, could not be enforced. Hence, perhaps, the form of prayer, and the form of bill in this case—a form which omits from the

Everett & al. ex'rs. vs. Towns.

bill the party that is the *indispensable* one in ordinary cases of this sort—the party that is, perhaps, the only one that is to be the ultimate loser or gainer by the event of the suit.

For such a bill I know not of any precedent. And in my opinion, for such a one there is no law.

If, however, there is for such a bill any law, it must be the law of specific performance—the law applicable to the specific performance of contracts.

One of the parts of that law is thus stated by Judge Story in his *Commentaries on Equity Jurisprudence*: “In truth the exercise of this whole branch of Equity Jurisprudence, respecting the rescission and specific performance of contracts, is not a matter of right in either party, but it is a matter of discretion in the Court—not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself as far as it may, by general rules and principles.” And this statement of the law is well supported by the authorities which he cited. (2 Story Eq, §742.)

It is not a matter of right, then, in either party to have a specific performance decreed. The Court may decree one or not, according to the facts and its discretion.

The judgment assigned for error in this case was that which, on the motion of the defendant, dismissed the bill. This judgment the Court put upon two of the three specifications of the ground taken in the motion to dismiss—these two—that the complainants had given no evidence of any contract of purchase by Everett from the State—that they had given no evidence showing Towns to have had notice of any contract of purchase by Everett from the State, before he, Towns, purchased from the State.

What evidence did the complainants give on these points?

On the first, they gave three receipts from the Comptroller General, dated respectively in 1820, 1831, 1832, acknowledging the receipt from Everett of three installments for several lots of land, and among them the two lots in dispute in this

Everett et al. ex'rs, vs. Towns.

case. This is all the receipts specify, and this is all the evidence the complainants gave of the contract of purchase.

Now it is true that it is difficult to account for the existence of these receipts, except upon the hypothesis that Everett had, by *some* contract, purchased these two lots from the State. But, then, it is equally true that there are in the case some other things which it is as difficult to account for, on the hypothesis, that he did purchase the lots, at least by any such contract of purchase as the law allowed of. If he purchased the lots, why did not the complainants show the certificate of such purchase, given to him at the time of purchase by the Sheriff, who, as the State's agent, sold him the lots? Why did they not show the return of the Sheriff to the State Treasury, which, if he, Everett, had been such purchaser, would have contained a statement of that fact? If Everett purchased under any law authorizing him to purchase, it is to be presumed that the certificates and the return both exist—the certificates in the possession of the complainants themselves—the return in the possession of the Treasurer of the State, and so within their reach for evidence—for the only law existing to authorize him to purchase the lots—that is, to authorize any sale of the lots, is a law which requires the Sheriffs, whose duty it is made to sell such lots, to give to the purchasers certificates "stating the amount paid, and the amount of such purchase money then due and to be paid, in three equal annual instalments to the Treasurer of this State," and "within sixty days after the sales of said lots," "to make a report of their proceedings to the Treasury;" "pay over to him the money received, and deposit a schedule of the lots sold, the amount of sales, cash received, balance due for each lot and from whom due." (Daw: Comp: 270, 266.) And it is to be presumed, until the contrary be shown; that the Sheriff who sold this lot to Everett, if one did sell it to him, did his duty, and so gave Everett a certificate of purchase, and made a report of that fact to the Treasurer. Besides, Wiley Williams testifies that the Sheriff, who, if any, must have been the one to sell these two lots, if they were sold according to law and at the time when it is alleged in the bill

Everett et al. ex'rs, vs. Towns.

they were sold, viz: in 1828 or 1829, did give certificates for all the lots which he sold, and did make a report of his sales, &c. to the Treasurer. Williams testifies that he himself wrote the certificates in blank, and that the Sheriff filled them and gave them to the purchasers. He says, the Sheriff made his return and settlement for the sales at the Treasurer's office, or that he did it for the Sheriff.

Here, then, is matter from which a strong presumption is to be made, that if Everett purchased the lots, he had a certificate of such purchase, and also written evidence of the purchase in the Sheriff's return to the Treasury.

If, then, Everett was the purchaser of the lots, why did the complainants not show these certificates, or show some reason for not doing that? Why did they not show the return of the Sheriff, with the statement in it that he, Everett, was the purchaser? Why they did not do these things is difficult to account for, if we suppose Everett to have been, as alleged in the bill, the purchaser of the lots.

But this is not the only difficulty. How could Everett have purchased, if he was not at the place of sale, and Williams, the witness, says that to the best of his recollection, Everett was not there? The complainants offer no proof that he had an agent there.

And this is not all: Everett, in his life time, in 1845, told Towns that he did not own these lots, and that he knew not who did.

But this statement of Everett is derived from the answer of Towns, and is a statement which, according to the argument of the plaintiffs in error, is not responsive to any allegation in the bill. In that, however, they are mistaken. The bill alleges that Everett "purchased of the State of Georgia" the two lots. It alleges that Towns knew that "the lots had been bought and paid for by" Everett. A statement of what Everett, himself, said with respect to his title, would be responsive to either of these allegations.

The result is that there are things in the case which it is as hard to account for, by the supposition that Everett did pur-

Everett et al. ex'rs, vs. Towns.

chase the lots, as it is to account for the Treasury receipts on the supposition that he did not purchase the lots. And that is but saying that the evidence on one side of the case balances the evidence on the other.

In such a case, the discretion of the Court to refuse a specific performance, or what is equivalent to one, and dismiss the bill, ought not to be disturbed. In every such case, the complainants ought, at least, to show a preponderance of evidence in favor of the contract on which they insist.

But in this case the preponderance is, if any thing, the other way, for in addition to what has already been stated as being adverse to the idea that Everett purchased the lots, there are the following circumstances: Everett never took possession of the land—never took out grants for it—never, as far as appears, claimed title to it, although he had almost twenty years within which to do any or all of these things, according to the statements in the bill; for, according to those statements, he purchased in 1828 or 1829. And his executors, the plaintiffs in error, did not commence this suit until 1852; until after all of the purchase money had been paid the State for the land as sold a second time—if it had ever been sold a first time..

Indeed, taking the bill to be true, the complainants need no help from Equity. Their *legal* title, they say, is complete. They say the legal title vested in Everett, at the time when he paid the purchase money to the State. If so, what use is there for this bill? None.

And I may say for myself, that I know of nothing that gives to a Court of Equity the power to grant the prayer of this bill. Whence did a Court of Equity get the power to nullify an act of one of the departments of Government. If it can nullify a grant made by the Executive Department, why may it not equally nullify a commission issued by that department—a military order made by that department—in a word, any act of that department? If it can do things of this sort, it must be by virtue of some grant of power to it in the Constitution, or in the law. I know of no such grant. Such a power English Courts of Equity do not pretend to have.

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

It is, however, the opinion of the whole Court that the Court below was justified in dismissing the bill on one of the grounds on which the decision was put, viz: that which has been considered—the ground that the contract of purchase was not sufficiently proved.

So the judgment ought to be affirmed. And it becomes unnecessary to notice the other ground on which the Court placed its judgment.

No. 3.—EDWARD B. YOUNG, assignee, &c. plaintiff in error, vs. JAMES HARRISON and another, administrators, &c. defendants in error..

- [1.] Where the owner of a parcel of ground had been deprived thereof, by an incorporated company, for the purpose of appropriating the same as a bridge site, and by virtue of a provision in their charter, an appeal had been taken from commissioners or appraisers to a Jury, and the latter were called upon to award just compensation to the land owner: Held, that the value and damage, at the time the land was taken, was the thing to be ascertained; but that to discover this, the Jury were authorized to look to the prospective value of the property as a bridge site, and to take that into consideration also, in determining what it was then worth.
- [2.] Where a portion of a land holder's real estate is thus taken from him, for public purposes, without his consent, commissioners, or a Jury in their stead, may take into consideration prospective and consequential damages, which result therefrom, if the same are plain and appreciable.
- [3.] Upon similar principles, when endeavoring to ascertain just compensation, the Jury should carry to the other side of the account the benefits (or increase in the value of the land) to the land holder; for they cannot justly award him compensation for an injury, if he has not been injured, but benefitted.
- [4.] If an instrument of writing be submitted to the Jury by one party, who afterwards proposes to withdraw the same, to which objection is made by the opposite party, who insists on its remaining with the Jury as evidence, an exception by him; after verdict, that the same was improperly admitted as evidence, will not be sustained.

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

[5.] Where an Act, incorporating a bridge company, provides that the company shall have power to select and take such parcel or parcels of land as they may deem necessary for the construction of the bridge, from any land owner, and requires that a plat of the land so taken shall be made, and with the award of the appraisers who shall assess the value of the land so taken, (or the verdict of the Jury,) shall be recorded in the Clerk's office of the Superior Court where the land lies, and shall vest the right of fee simple to the land in the company: *Held*, that upon trial of a case made by appeal from appraisers to the Superior Court, the said plat should have been submitted to the Jury; and it was error in the Court to reject the same as evidence for their consideration.

Proceeding to assess damages in Randolph Superior Court.
Tried before Judge PERKINS, April Term, 1854.

Under the charter of the Irwinton Bridge Company, they were authorized to appropriate the land necessary for an abutment on this side the river, and a proceeding was authorized to ascertain the value thereof, in the event of a disagreement with the owners. Such disagreement having arisen, the appraisers assessed the damages at *Ten Dollars*. The defendants in error (Harrison) appealed to the Superior Court; and on the trial of this appeal, the errors assigned are alleged to have occurred.

The Court decided the assessment by the appraisers at \$10, was admissible as pleading, but not as evidence of the true value. This is the first error assigned.

Sundry exceptions were made to evidence admitted and rejected. They are all included in the questions made upon the charge of the Court.

The Court charged, that the only issue was the value of the land; that the Jury were acting as appraisers, and should be governed by the evidence; that in ascertaining the damages, the purposes for which the land is valuable, are to be taken into consideration. If it was taken as a bridge site, it must be paid for as such; and all the surrounding circumstances are to be taken into the account, and the estimate of value or damages was to be made now, as of the present time, when the title is to be disposed of.

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

Suppose, said the Court, no bridge had been built, the Jury would have to inquire what would be the probable amount of travel, tolls, commerce, and the probable value of ware-houses, wharfs, towns, villages, &c. to grow up on the other side of the river, with and without a bridge, in order to ascertain damages or value as a bridge site. The bridge being built, the Jury were not left to suppositions—but evidence of these things had been admitted to show the eligibility of the site and its value; and for this purpose, were proper for their consideration; that the Jury were to take into consideration not only its value to the Harrisons, who did not own the franchise, but its value to the company, who did own the franchise; that its value to the company was indeed the proper question for the Jury; that in addition to this, the Harrisons were entitled to recover whatever damage was done to their other property—to their private interest—to their other lands and interests—than that portion occupied as a bridge site. Whatever damages or injury they sustained, in any way, independent of the damages or value of the bridge site, are to be taken into the account. If their other lands were valuable for ware-houses, wharfs and towns, or for any other purpose above and below the bridge, and this value decreased in consequence of the occupation of the bridge site, they were entitled to just compensation therefor.

To all and every part of which charge Young excepted.

Counsel for Young then asked the Court, in writing, specifically to charge the Jury—

1st. That the Harrisons are entitled to recover the damages or value of the land as a bridge site, to be estimated by its condition or value, when the Act of incorporation was passed, or prior to the building of the bridge; which specific charge the Court refused to give, and charged in lieu thereof, that the damages or value was to be estimated as of the present time, and the Jury could look to all the matters before stated, such as amount of tolls received, damages to other interests, value to the company, &c. for the purpose of ascertaining them.

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

To which refusal to charge, and charge as given, Young excepted.

2d. To charge the Jury, that said damages or value is to be estimated without taking into consideration the value of the bridge and the amount of tolls received thereon, which charge, as asked, the Court refused to give, and gave in lieu thereof—that the damages or value was to be estimated without taking into consideration the cost of bridge, but in order to arrive at them the Jury might take into consideration the amount of tolls received upon the bridge.

3d. To charge the Jury, that said damages or value is to be estimated without taking into consideration the franchise, or the right to build and have the bridge. That while the title to the land was in the Harrisons, the franchise or right to build the toll bridge was in the State, and there remained, until the Act of incorporation conferred it upon the Bridge Company, and that said grant to the company does not, in law, enhance the value of the location as a bridge site to the Harrisons.

Which charge, as asked, the Court refused to give, and gave in lieu thereof, that the value, as a bridge site, was to be estimated by its value to the Irwinton Bridge Company; and that for the purpose of arriving at it the Jury might take into consideration the franchise to the company.

4th. To charge the Jury, that the Harrisons were entitled to recover the damages or value as a bridge site, and for all other purposes to which they could appropriate it, except and irrespective of the franchise or right to build the bridge.

Which charge, as asked, the Court refused to give, and gave in lieu thereof, that its value to the company was to be estimated, and that the Harrisons were entitled to recover as much therefor, as though they had the franchise.

5th. To charge the Jury that the Harrisons had neither the right to establish toll bridges or toll ferries; and therefore the building of the one or destruction of the other, does not oper-

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

as an element of damages or value under the Act of incorporation.

Which charge, as asked, the Court refused to give; and gave in lieu thereof, that if the building of the bridge has in any way affected the private interests of the Harrisons, they are entitled to compensation therefor, though they did not have the right to build or establish toll bridges or toll ferries, and have no right to compensation if destroyed.

6th. To charge the Jury, that the increased or decreased value of the other parts of Harrisons' land, because of the building of the bridge, for ware-house, wharf or other purposes; and the increased or decreased value of the property in ~~Hartford~~, is not to be taken into consideration to increase or decrease the damages or value of the land on which the bridge is built.

Which charge, as asked, the Court refused to give, and gave in lieu thereof, that the decreased value of any property, no matter what, owned by the Harrisons, was to be taken into the account, as well as the increased value of any property to the company.

7th. To charge the Jury, that the Harrisons are entitled to recover, in this case, the damages or value of the land as a bridge site, and for all other purposes not connected with the franchise, to be estimated upon the condition of the land when the Bridge Company took possession thereof, and mesne profits for its use in their action of ejectment now pending, as decided by the Supreme Court, in the case reported in *3 Kelly*.

Which charge, as asked, the Court simply refused to give, charging nothing in lieu thereof.

8th. To charge the Jury, that they should only give such damages to the Harrisons as they shall think, from the evidence, they would have given, had they been selected to appraise the land as a bridge site, giving just compensation without extension, knowing that the Harrisons had no right to build a toll bridge at the place.

Which charge was given.

9th. To charge the Jury, that they must leave entirely out

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

of their computation the value of the franchise which was granted to the company.

Which charge, as asked, the Court refused to give; and gave in lieu thereof, that the Jury could take into consideration the franchise, in estimating the value of the bridge site to the company.

10th. To charge the Jury, that under the Act of incorporation, the damages or value of the site to the Harrisons must be estimated, and not the value of the site to the company. Which charge the Court simply refused to give.

11th. To charge the Jury that the Harrisons had no right to establish toll ferries or build toll bridges, without a grant from the State; that the State not having granted such right, the Court and Jury cannot confer it, either in the shape of tolls or in any other mode; that they (the Harrisons) are entitled to just compensation only for the land actually appropriated to the use of the bridge, and that in estimating such compensation, all the uses or purposes to which that land, and that only, could be appropriated, are to be taken into the account.

Which charge, as asked, the Court refused to give, and Young, assignee, then and there excepted to each and every of said specific charges, as refused to be given, and to each and every charge as given in lieu thereof.

The Jury returned a verdict for \$13,007.00.

A new trial was moved on all the exceptions taken, and also because the damages assessed were excessive. The refusal to grant a new trial is also excepted to.

On all the exceptions error has been assigned.

Judge BENNING having been of Counsel in this case, did not preside.

H. HOLT, for plaintiff in error.

S. JONES; L. WARREN, for defendant in error.

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

By the Court—STARNES, J. delivering the opinion.

[1.] The main question, in this case, arises on the point made as to the proper measure of recovery for the land which has been taken from the intestate, whom these defendants in error represent, by the Irwinton Bridge Company, as a site for one of the abutments of their bridge.

The Act incorporating the Company, provides that the "damages or value of the land required by the corporation," shall be ascertained by appraisers, or by a Jury, upon appeal to the Superior Court; and shall constitute the compensation of the landholder. This provision is not very explicit, but we think that it was not intended to conflict with the principles of the Common Law of force in our State, or with that feature of the Federal Constitution, if it have any thing to do with the case, requiring that private property shall not be taken for public purposes without "just compensation." We think that this provision of the charter was simply intended to declare the method by which such just compensation should be awarded; and that the only true measure of recovery in this case is that which secures that compensation. The simple inquiry should be then, how shall such compensation be ascertained.

Let us look at the question from this point of view, and we will readily see that the land owner in this case, cannot get compensation for the deprivation of this particular piece of ground, unless he receives, in the first place, what it was worth, to him, as a bridge site, or its equivalent, at the time of such deprivation. But to determine what it was worth to him, we must look to the circumstances of the case. If he owned the land for half a mile on one side of the bridge and for a greater distance on the other, and if, consequently, there was no eligible site upon the land of any other person opposite to the town of Eufaula, (and these facts are stated in the testimony) then, upon the simple principle that supply and demand regulate the price of any given article, a bridge site upon his land was worth more than if the supply had been greater, and there had been

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

other localities upon the lands of other persons which might have been procured for this purpose. The land on which this bridge rests, in such a case, would be worth more, of course, than its value for agricultural purposes. It would have a particular value in the market, as a site for one of the abutments of a toll-bridge—a value to be regulated according to the extent of the demand.

It is then necessary to ascertain the extent of this demand. If the proposed bridge was to be constructed upon a highway over an inconsiderable stream, one not navigable, or upon a navigable stream, at a place where there were no improvements or prospect of improvements, in the shape of a town or village, or place of trade and of shipping produce, the site of the bridge would be worth much less to a company proposing to construct it and procuring a charter for this purpose, than if the bridge was to be constructed over a navigable stream, one on whose banks there was the prospect of a thriving place of business springing into existence by the aid of such a crossing place; and thus attracting much trade and travel across the bridge; and it is plain that the site of the bridge, in the latter case, would be increased in value, solely because the bridge would be more valuable.

We perceive at once, therefore, how important, nay, how necessary it is, where private property is thus taken from a citizen (who holds it in the market, as a bridge site) by a chartered company, who take it from him avowedly for public purposes, but also by erecting a toll-bridge to enhance their own gains and profits, that in order to ascertain the value of that piece of ground to the owner, and thus give him "just compensation" therefor, the value of the bridge as a toll-bridge to the company should be ascertained, if possible, or approximated, by ascertaining the character of the stream and of the place of crossing, the amount of travel and transportation which would probably pass over it, and the consequent amount of toll which would be received yearly. And if the effect of constructing such a bridge would be to build a large town, warehouses, &c. at or near the place, and thus attract much transportation and

Young, assignee, &c. vs. Harrison and another, adm'r, &c.

travel across the bridge, this of course would make it more valuable to its proposed owners—would make it more to their interest to pay a higher price for the site—that is to say, would be to *increase the extent of the demand for the bridge site*. In such case, it would certainly be a great hardship, not to be tolerated, in a free country, if a citizen, owning a piece of land of this description, whose prospective value, derived from its situation as affording facilities for a bridge site, was as *much his property* as was its soil for planting purposes, (it may, indeed, have been purchased with reference to such value) could be compelled to part with the same, and forced to give up his property in the prospective value of the ground, and receive only its value for agricultural purposes, or its value as a bridge site on the day when it is taken, estimated by the trade and travel which would that day have passed over it if the bridge had been built. Such could not be a case of "just compensation."

It is not difficult to see that such prospective value of a piece of ground might be its chief element of value to its owner. An owner of land, peculiarly situated by reason of its proximity to some great city or great work of internal improvement, may look into the future and see that it will, at some distant day, become extremely valuable by reason of its situation, and that none other can be procured for the purpose for which he anticipates that it will be needed. He desires, accordingly, to keep it, knowing that it will be a fine property for his children, if not for himself. If deprived of that property for public purposes, and especially for the benefit, at the same time, of a private company, can he have "just compensation" unless reference is had to the prospective value of the land, and unless that is, to some extent at least, taken into the account?

Let us present an illustration: we will suppose that soon after the dépôt of the Central Rail Road & Banking Company, was established in Savannah, the company anticipating the enlargement of their business and the extension of their road, became desirous of purchasing a lot of land which lay near thereto, over which to construct a turn-out, or erect some im-

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

provement, which the interests of the road required. They proposed to purchase this ground from the owner, and offered to him what such lots were worth in that part of the town, without reference to the road. He declined, saying, "if there be other lots which can be had for the same purpose, then I grant that I may be compensated when I get for my lot that for which you might purchase such lots. But if there be no other lot but mine which will serve the important purpose for which it is desired, and if in process of time the enhanced value of my lot, by reason of your road, will be a fortune to my children; it is my interest and that of my heirs, to retain possession of my lot until its value is thus enhanced. And you cannot have it unless you give me "just compensation" by taking into view its prospective value, and paying me what it is reasonably worth to you as part of your investment." Would not this answer have been founded in correct principles, and if the Rail Road Company had taken possession of said parcel of ground, by virtue of their charter, would not any Court have required them to give "just compensation" therefor, by taking into consideration the value of said property, according as it might be estimated with reference to the improvements going on in its vicinity?

In this point of view, it was proper for the Court below to charge the Jury, that in order to ascertain the value of the land in question as a bridge site, they would have to inquire the probable extent of the town or village, the amount of travel, tolls, commerce, and the probable value of ware-houses, wharves, &c. to grow up on the other side of the river. And for this purpose, the testimony to this effect of the witnesses, was properly admitted. The value estimated, should have been the value at the time the property was taken, what it should then sell for as a bridge site, taking into consideration the number of other lots in the vicinity belonging to other persons, which might be used for such purpose, and the probable value of the bridge to its owners when it should be erected. And such should have been the method of ascertaining it, if it had been assessed at the time the land was taken. Interest upon the

Young, assignee, &c. vs. Harrison and another, adm'rs, &c..

value, at that time, should be added, if the assessment be made at a date long subsequent. (*Parks vs. Boston*, 15 Pick. 206.) And when, at a subsequent date, especially if many years had elapsed, it became necessary for a Court and Jury to ascertain what was the value of the land at the time it was taken, with reference to its prospective advantages, surely no more accurate criterion could be found than proof of the amount of tolls which had been received, the value of the structure, &c. as it then stood.

[2.] But there is another element in the calculation of what would be just compensation to the land owner in such a case. If, by depriving him of this piece of ground, the value of his contiguous property was seriously impaired, that also should be taken into the account, in order to insure him just compensation. If, by taking this piece of ground from the intestate of the defendants in error, and the erection thereon of a bridge, his land contiguous to it was depreciated in value for warehouses or other purposes, it would seem that he or his representatives could not be compensated for that which had resulted from the deprivation of this property, unless this injury were taken into the account. There can be no doubt that this principle is correct, so far as immediate damage is concerned. Some persons have hesitated in applying it to prospective or consequential damage. But we apprehend that when the effort is made, not a little difficulty will be found in discriminating between the two, in distinguishing them or telling where one begins and the other ends. We incline to think that the simple rule is the best rule, and that is tested by the inquiry—can it be clearly and plainly ascertained that a pecuniary loss has resulted to the land holder in the value of his contiguous real estate, by the deprivation of the land in question? And especially is this the better rule, if consequential benefit to the land owner is carried to the other side of the account in estimating compensation. We will presently show that this should be done.

It will be remembered that the question, is not whether or not an action will lie at Common Law for such consequential

Young, assignee, &c. vs. Harrison and another, adm'r, &c.

or prospective damages. Such an action, we know, would not be maintainable, because that could not be held to be, a *tort* which was done by authority of law. And it is to this point that the dicta read from Sedgwick on *Bom.*, 110, 111, were applicable. But the question is, whether or not commissioners or appraisers, or a Jury acting as such (under a statutory regulation) appointed for the purpose of ascertaining such just compensation, and thus empowered to look into the natural equity of the case, should take such consequential damage into consideration, where it is plain, definite and appreciable.

In a learned treatise on this subject, to which we have been referred by the Counsel for the plaintiff in error, we find this rule supported as follows: "If damages are the necessary result of a franchise, they are always provided for, and may be ascertained by commissioners, whose duty it is to take into consideration prospective as well as immediate injuries, but no compensation is due for damages resulting from extraordinary causes." (*Am. Law Mag.* Apr. 1848, p. 70.) This rule is laid down, too, in one of the cases read by the Counsel for the plaintiff in error. In the case of *Callender vs. Marsh*, 1 *Pick.* 452, the Supreme Court of Massachusetts say: when highways or public streets are "rightfully laid out, they are to be considered as purchased by the public of him who owned the soil, and by the purchase the right is acquired of doing every thing with the soil over which the passage goes, which may render it safe, and convenient; and he who sells, may claim damages not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots, calculating upon the future probable reduction or elevation of a street or road; and all this is a proper subject for the inquiry of those who are authorized to lay out, or of a Jury, if the parties should demand one."

Several decisions, to this effect, by other distinguished Judges in the United States, may be found; and their roots are inserted deeply into the principles of natural equity, of the Common and Civil Law, and of the Constitution. In England, too, sim-

Young, assignee, &c. vs. Harrison and another, adm'ree, &c.

Her decisions have been made—some of them quite recently. To a few I will call attention. By the 7 and 8 Vict c. 58, the Hull Dock Company were empowered to take certain lands, and in default of agreement with the owners, the Act provided that "the purchase money and compensation for damages sustained, before the time of inquiry, or future damage, were to be assessed by a Jury;" Held, "that these words were large enough to include compensation to a land owner for loss which he would have to sustain by giving up his business as a brewer, until he could obtain other suitable premises for carrying it on." (*Jubb vs. Hull D. Co.* 9 Q. B.)

See also *Lawrence vs. Great N. R. Co.* 15 Jur. 652. *A. & W. Ind. D. Co. & B. J. R. Co. vs. Gatske,* 15 Jur. 261. *L. & N. W. R. Co. vs. Bradley,* 15 Jur. 680.)

[3.] But, upon similar principles of justice, if the damages in such case resulting should be considered, so should the benefit to the land holder. As we have suggested, the proceeding by appraisers or commissioners, or a Jury in their stead, upon appeal, to ascertain the just compensation due a land holder, is not the action of a tribunal organized and proceeding according to strict Common Law forms, and Common Law rights. Such a tribunal may, therefore, even if no special provision be made by Statute, to this effect, consider the equities of the case, and render justice accordingly. . . .

No one can dispute the strong natural equity which dictates the propriety of considering the advantages, which the land holder has gained by reason of his land having been taken for some public work, as an offset to the injuries. And if this be naturally just, and the forms of law do not obstruct, why should not the award or verdict be rendered accordingly?

The terms employed, and the character of the proceeding, support the idea, that this is what is intended. Compensation is the thing provided for—just compensation—not payment in money. And the term compensation seems to have been advisedly adopted. It is borrowed from the Civil Law, where its use and signification strikingly favor the view we are submitting. We know, too, that damages for a civil injury might be

Young & Duglass, Dr. Wm. H. Hinckley and Brother, Edm'rs, &c.

compensated, or pleaded as an offset in some cases at the Civil Law. (*Inst. L. 13, § 2 D. de Compens.*) When, then, we find the word employed in the Common Law and the Constitution, to the case in question, the presumption is that it was done advisedly; that the word was used in its most familiar legal sense; that it was thereby intended, that "recompence" —the non-payment in money; should be made to the land holder; that such compensation was required, it should be made ~~equally~~ ~~equitable~~ ~~proportionately~~ ~~equally~~; and that accordingly, all such advantages or benefits derived by the land holder, by reason of the public trust, or the exercise of the franchise, upon his land, is such as just and equitable that he should not be paid in money for his land, "should be carried to the account of such compensation."

The tenth of the subject is very ably discussed in the same well-known treatise which we have already referred, and in which the learning on this subject is thoroughly considered and examined. Advertising to this proceeding by a board of commissioners or appraisers, for the purpose of assessing damages, the writer says: "A board of commissioners does not proceed upon the principles of law. They do not simply determine the amount or degree of damage. They take into consideration the advantage derived, as well as the damages sustained, and ascertain the measure of indemnity by other rules than those which govern Courts of Law. Even if the question of compensation be submitted to a jury, they act in the character of commissioners. Whether claims for damages are acted upon by a Jury or commissioners, they may be regarded as administering a delegated authority —as exercising a legislative function; and thus, dispensing the discretion of the sovereign or the Legislature." (*Amer. Law Mag. Apr. 1843, p. 55.*)

We apprehend that this is entirely correct, and that the Courts who have held that the land holder, under the requirement of the Constitution, should be paid for his land in money, (especially the Supreme Courts of Kentucky and Tennessee,) have lost sight of the above considerations.

It is sometimes said that the benefits derived by a land hold-

Young, assignee, &c. vs. Harrison and another, adm'r, &c.

der from a public work, for the benefit of which his land has been taken, should not be considered except so far as they are advantages peculiar to himself (as the erection of a station for example, which enhances the value of his land) and not enjoyed by other land owners contiguous to the improvement. But this is not logical. What matters it, if others have been benefited? They are taking no issue with those who construct the public work. But do those land dons, then, make such issue, and the duty has been devolved on his fellow citizens of ascertaining whether or not he has been injured, and how much. And can they say he has been injured and is justly entitled to compensation, if they find he has been benefited?

It is very true that the method of arriving at such compensation is, in its nature, not very precise, and more or less dependent upon the speculative opinions of witnesses. But this is no good objection, as a very large portion of that testimony, which is constantly and necessarily received in Courts of Justice, for the purpose of ascertaining the value of property and the damage done to it would be excluded.

We add that this just method of settling the damages of such parties, has received the repeated sanction of our Legislature. For this provision that the damage to the land holder shall be estimated on one side, and the benefit on the other, and the balance in his favor, if any, shall constitute his compensation, has its place in the charter of almost, if not quite every Rail Road or Plank Road, which has been incorporated in our State.

In accordance with such views as we have just presented, the testimony which was admitted by the Court for the purpose of proving the value of property in the town of Resaca, and of the value of the bridge, viz: of Seaborn A. Smith, except so much of it as related to the value of Seth Lore's property, (and that was proper as serving to show why he may have been willing to take less than its real value for the site on which the abutment of the bridge rested in Alabama) the evidence of George W. Pournell, the evidence of George L. Barry, of Henry L. Taylor, of John R. M. Neel, and the records of the Inferior Court establishing roads, were properly admitted.

Young, assignee, &c. vs. Harrison and another, adm'rs, &c.

[4.] To the withdrawal of the deed of Seth Lore, the record above objection was made by the plaintiff in error, the defendants offering to withdraw the same from the Jury as evidence. It would be very strange, indeed, if, after an objection of this kind from the plaintiff in error, he could be allowed to take advantage of any error in its admission. If the deed had been improperly admitted, and the plaintiff in error, apprehensive that the minds of the Jury had been prejudiced by having seen the deed, desired to take advantage of this, by way of exception, he should have permitted the deed to have been withdrawn, thereby sanctioned the position that it was improper, and have availed himself of his right to except to its admission at all. But as the point is presented, the record exhibits the plaintiff in error in the attitude of objecting to the withdrawal of a piece of testimony, insisting that it should remain with the Jury as evidence, thereby sanctioning the idea, for the purposes of that investigation by the Jury, that it was evidence; and afterwards, objecting that the Court erred in permitting it to go to the Jury as such.

In accordance with the principles just laid down, too, the charge of the Court, as we understand it, when construed with reference to the case made by the evidence, was for the most part substantially correct. His Honor was not exactly accurate, however, in saying that "the estimate of value or damages was to be made, now, as of the present time, when the title is to be divested," without sufficiently qualifying this, and showing that the circumstances of present value, &c., might be considered, but as a criterion of what was the prospective value of the land, and extent of damage, &c., at the time when the land was taken by the company.

[5.] But in our opinion, the Court erred in ruling out the plot of said ground as evidence in the case. The same being made proper evidence by the Act incorporating said company, and required to be filed as such with the verdict of the Jury.

And without which, there was no specific evidence of the land taken, before the Jury.

This appears to be strictly a technical error. But granting

Molynex et al. vs. Collier.

that it is so, it is a material error: And for reasons which perhaps it is unnecessary to particularize; we are not altogether dissatisfied, that it gives us the opportunity to send the case back for a re-hearing.

No. 4.—EDWARD MOLYNEUX and others, plaintiffs in error
vs. GEORGE W. COLLIER.

- [1.] Benefit to the creditor or injury to the debtor, will either constitute sufficient consideration to support a new contract between the parties.
- [2.] The doctrine has gone to the extent of holding that the legal possibility of a benefit to the creditor, is sufficient to sustain a new agreement between him and his debtor.
- [3.] Ordinarily, satisfaction, in whole or in part, of g. & f. may be shown as law.
- [4.] Where payment of an execution is complicated with other matters, such as discovery, to ascertain who was the true owner of the g. & f. at the time the money was paid, a resort to Equity being necessary for this purpose, that Court will retain jurisdiction to administer relief also.

In Equity, in Dougherty Superior Court. Decision on the
manner, by Judge PERKINS, May Term, 1854.

This bill was filed by George W. Collier, and alleged the following state of facts:

Collier, Bracewell and St. George, entered into a partnership, for the purpose of merchandising at Hawkinsville, under the name of Collier & Bracewell. Edward Molynex received judgment against Collier & Bracewell, with St. George as surety on the appeal, for \$2,000, with interest and costs. The firm was insolvent; and the partners individually liable were in doubtful, if not insolvent circumstances. John Bowles, with a full knowledge of these facts, purchased this g. & f. from

Molyneux et al. vs. Collier.

Molyneux, and held it against the partners. He was President of the Bank of Hawkinsville, and a large stockholder therein; and as such, controlled large f. fa. and mortgages against St. George. Bracewell had possession of some property, but there was a cloud over his title, it being claimed by his son-in-law. Collier, the complainant, was insolvent. Under these circumstances and in view of these facts, Rawls proposed to Collier, Bracewell and St. George, that if each one of them would, from his personal efforts and yearly labor, pay to him one third the amount of the said f. fa. he would release and discharge the one so complying with this offer, from all farther liability thereon. Collier and St. George, each complied with this proposition. Bracewell failed to comply, and in 1840, removed beyond the limits of the State, carrying with him the property, negroes and stock in his possession, Rawls permitting him so to remove, without attempting to stop him, or to levy on and try the title to said property, against and in spite of the remonstrances of Collier, and his earnest appeal to him to levy thereon.

Rawls died, and his wife and G. Taylor became administrators upon his estate. With a view to defraud Collier and St. George, the said administrators procured Molyneux to transfer the said f. fa. to the Merchant's Bank of Macon, in whose name it was proceeding at the time of the filing of the bill, having been levied on property as the property of Collier, for the payment of the remaining third due thereon.

In the bill as originally filed, it was alleged that Bracewell carried away property amply sufficient to pay the said f. fa. and that Rawls permitted him to remove. In an amendment, this allegation was modified as previously stated. The amendment also alleged, that St. George, although possessed of a considerable estate, was nevertheless largely involved; and that Rawls held a large claim against him; and if all his debts were pressed against him, he would have proved to be insolvent.

Exhibits of the mortgages and debts due by St. George were not attached to the bill. The amendment alleged, also, re-

Molyneux et al. vs. Collier.

new payments by St. George; and also claimed a credit from the sale of a negro, the property of Collier, and prayed discovery as to the payments on the *f. fa.*

The prayer was for an injunction and general relief.

To this bill a demurrer was filed—

1st. For want of Equity.

2d. A complete remedy at Law, as to the payment of the *f. fa.*

3d. That the contract set forth in the bill was without consideration and a *nude pact*.

4th. That there is a repugnancy in the statements of the bill and amendment.

5th. That there should have been attached to said bill exhibits of the said mortgages, debts, &c.

The Court over-ruled the demurrer, and error is assigned thereon:

MORGAN & SCARBOROUGH, for plaintiff.

CLARK & STROZIER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] When this bill was originally filed, the complainant considered it his interest to make it appear that both St. George and Bracewell, his co-debtors, were solvent in 1842. And this Court was satisfied, when this case was up before, that this fact was sufficiently alleged by the bill. But taking a different view of the law of the case, from that entertained by the Counsel for the complainant, the Court held that the very fact that St. George and Bracewell were solvent, instead of constituting a good reason for sustaining the contract entered into between Rawls and Collier, in 1842, was the very ground why that agreement could not be enforced. See 18 Ga. Rep. 406.

Well the bill has been amended to meet this new aspect of the case, and it is now insisted that St. George and Bracewell

Molyneux et al. vs. Cotton.

were insolvent in 1842? And viewing either witness, and without adverting to the past, Counsel have gained hope on the argument, mainly upon the fact, of whether or not the insolvency of St. George and Bracewell are sufficiently charged by the bill as amended? The whole statement, when condensed, amounts, in substance, to this:

That the property in the possession of James M. Bracewell in 1842, would have been sufficient to have paid one third of the execution, although there was a cloud over the title, it having claimed by Peter E. Love as the property of his wife, the daughter of said Bracewell; and that when complainant alleged, in his original bill, that the property was more than sufficient to pay one third of the debt, at the time Bracewell left the State, he only used that term to show, clearly, there was enough to pay one third; and further, that this fact was only alleged as an equity, predicated upon the contract made with Rawls, who after making the same, permitted Bracewell to leave the county, with property in his possession, without attempting to subject it, and then attempted to enforce the payment of the whole out of your orator. For in truth and in fact, Bracewell was under serious pecuniary embarrassment, and was held, considered and esteemed insolvent, notoriously. Debts against him were of very little value, and he had no credit on his own account.

And further: that at the date of the agreement between complainant, Collier, and John Rawls, Edward St. George was laboring under very heavy pecuniary liabilities; and if not absolutely insolvent, his condition was very trifical and uncertain. There were judgments, to a large amount, open and outstanding against him and which were pressing for collection, within the knowledge of Rawls. The whole country groaned under a financial crash, threatening a general bankruptcy, and which so depressed the price of property, of all kinds, that men who were nominally possessed of a large quantity of property, in kind, and who, in better times, would have been abundantly able to pay their debts, yet, had they been

Melyneux et al. vs. Collier.

should be liable, this would have proved insolvent; and such the amended bill charges to have been the condition of St. George, within the knowledge of Rawls.

That in February and May of 1841, St. George executed two mortgages to Rawls, to secure the payment of two several promissory notes, amounting, together, to \$6,733⁷⁵, which mortgages embraced all the lands and all the negroes that St. George owned, in his own right—Besides, four slaves which were the separate estate of his wife; that at this time, the B'k of Hawkinsville held against St. George a judgment amounting to \$16,000; and that Rawls was the principal stockholder in said bank; that, in fact, Rawls must be considered as owning and controlling the whole of these demands, and that knowing of the indebtedness of St. George, and the extreme low price of property, and that the judgment in favor of Edward Melyneux against complainants, the said Bracewell and St. George, was older than the mortgages, it put these junior claims in great jeopardy, he entered into this contract, &c.

St. George and Bracewell being thus circumstanced, was the contract between Rawls and Collier, that the latter might pay his third of the *fit fa.* in services, good? It is well settled, that if there be any benefit to the creditor or detriment to the debtor, resulting from the new contract, that will be a consideration sufficient to support it. And Mr. Smith, as the result of his review of the whole doctrine, upon this subject, says, that if there be a legal possibility of benefit to the creditor, it is sufficient to sustain the agreement. (*Opus de Camber vs. Waynt;* 1 *Smith's Leading Cases*, p. 749.)

Can any one doubt, admitting the charge in the amended bill to be true, that Rawls was in danger of losing the whole or some part of his debt? As to Bracewell, we think his inability to pay is made very apparent; and so far as St. George is concerned, while it may be conceded that the partnership debt could have been collected out of him, that being one of the oldest, if not the very oldest, lien against St. George, still, had his action of *quitclaim* been brought up of the effects of St. George, the danger was, that the younger mort-

gage debts, by that very means, would be lost. It was, therefore, just as much the interest of Rawls to protect the younger as the older demands. He was equally interested in all. He would have been just as much loser, by failing to realize the mortgage demand, as either of the others. And it is in this aspect of the case, that the compact with Collier is to be considered; and which has been wholly overlooked by Counsel for the plaintiff in error.

[2.] By getting one third of the large firm debt paid by the personal services of Collier, instead of collecting the whole out of the property of St. George, it increased just to that extent the prospect and probability of getting the mortgage debts discharged. Here, then, is the possibility, to say the least of it, of legal benefit to the creditor, in contemplation of the rule as laid down in the Books.

[3.] But another question is made for our decision by Counsel, in his concluding argument, and it is this: Had the complainants an adequate Common Law remedy, to prove that the execution was satisfied?

[4.] Ordinarily, payment may be shown at Law. But here, this defence is complicated with other matters. Besides the matters already discussed, it appears from the amended bill, that St. George is dead, and that Collier, as administrator upon his estate, has come into the possession of sundry receipts for payments made by the deceased in his life time, to the plaintiff, the knowledge of which was concealed from Collier by the parties, and he seeks discovery respecting these payments. And that is not all—these payments were made to Rawls, who was not the ostensible owner of the debt. Discovery is prayed as to the proprietorship of Rawls to this claim, and consequently, his authority to receive these payments. There can be no doubt of the jurisdiction.

Of course the case made by the bill, upon all the points, must be supported by proof.

McDougald and others vs. Maddox and Wife.

No. 5.—ALEXANDER McDougald and others, plaintiffs in error, vs. Wm. A. T. MADDOX and WIFE, defendants in error.

[1.] William Moughon died testate, appointing John Mitchell his executor, who qualified and took possession of his estate; and subsequently was appointed guardian of Sarah, the infant daughter of his testator. Mitchell died testate, appointing Alexander McDougald and others his executors. McDougald qualified and took the exclusive possession and control of the estate of Mitchell, amounting to \$100,000. McDougald also was appointed guardian of the minor, and owing to the transfer of the guardianship from one county to another and other causes, several bonds, with different sets of sureties were given: Held, 1. That a bill filed against McDougald and the several sets of sureties, was not objectionable on the score of multifariousness. 2. That actions having been instituted *at Law* upon each of the bonds, the remedy was ample; and that a bill filed against the principal and all the different sureties, could not be entertained, there being no allegation of the insolvency of the principal. 3. That where several suits are pending *at Law*, if discovery is needed, and a resort is had to Chancery to obtain it, a separate bill must be filed in each case; and the whole cannot be consolidated for that purpose.

In Equity, in Muscogee Superior Court. Decision, on demurrer, by Judge CRAWFORD, January Term, 1854.

William Moughon departed this life, leaving a considerable estate, to one half of which his daughter Sarah E. was entitled under his will. John Mitchell qualified as executor, and became guardian of the minor, and continued such guardian, without making any returns or settlement, until his death in 1841. He died testate; and Alexander McDougald qualified as his executor, and took sole possession and management of John Mitchell's estate, amounting to \$100,000 or some other large sum, and thereby became liable to account for the estate of the said minor. In 1841, said McDougald became guardian of the minor, giving bond with Daniel McDougald, Elizabeth Mitchell and William C. Osborn, as his sureties. In 1842, Osborn complained to the Ordinary of the mismanagement of McDougald, as guardian, when George H. Bryson, James C. Huey, Miles Moore, Richard W. Armer and Spencer Reynolds

McDougald and others vs. Maddox and Wife.

added their names as sureties to the original bond. In 1847, McDougald removed his guardianship from the County of Harris to the County of Muscogee, and gave a new bond, with Daniel McDougald and Duncan McDougald as sureties. William A. T. Maddox afterwards intermarried with Sarah E. Moughon, and to him McDougald delivered, as a part of her estate, forty-nine negro slaves. Failing to account for the hire and profits, suits were brought by Maddox and Wife upon both the bonds before set forth on the Common Law side of the Court.

Pending these suits, Maddox and Wife filed their bill in Equity against the guardian and all of the sureties on both bonds, alleging the foregoing facts, and farther, that it is impossible for them to allege and prove, at Law, at what time the guardian committed the several breaches of his bond, in order to distribute the liability properly among the several sureties upon the respective bonds. That the several sureties deny that the breaches occurred during the time of their liability, and cast upon the complainants the *onus* of proving the same, which it is impossible for them to do. The bill prayed for a full discovery from McDougald and the sureties, so as to locate the several breaches, and a decree accordingly.

To this bill a demurrer was filed, 1st. For want of Equity. 2d: Because of the pendency of the Common Law actions. 3d. For multifariousness.

The Court overruled the demurrer, and this decision is assigned as error.

The Court ordered the defendants to answer by the next term of the Court, the defendants objecting, 1st. Because no usual rule had been taken. 2d: Because there were several pleas in bar which had not been heard or determined. Of the filing of these pleas, the complainants had no notice.

This order for answers is also assigned as error.

Judge BENNING having been of Counsel, did not preside in this case.

McDougald and others *vs.* Maddox and Wife.

JONES & JONES for plaintiff in error.

H. HOLT, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

[1.] The view we have taken of this case, supercedes the necessity of considering many of the questions which have been discussed by Counsel. And we propose to dispose of it very briefly.

And first, our conclusion is that the bill is not obnoxious to the charge of multifariousness. True, John Mitchell acted as both executor of William Moughon, deceased, and as guardian of Sarah, the infant daughter of his testator. Still, he having died, abundantly solvent as the pleadings admit, and Alexander McDougald having qualified as executor upon the estate, and taken the exclusive possession and control thereof, amounting to \$100,000 or some other large sum, he either retained in his hands assets sufficient to cover the indebtedness of Mitchell, in any and every capacity, or he is liable for neglect of duty in failing to do so. The entire solvency of Mitchell's estate, which passed into the hands of McDougald, divests this transaction of all complexity, save that which the ingenuity of Counsel has thrown around it. Moreover, McDougald having officiated in the double capacity of executor of Mitchell, and guardian of the minor, continues the unity of accountability, if I may use such expression, throughout. It is suggested in the argument, that if we would substitute different persons in the various trusts exercised by Mitchell and McDougald, the incongruity of the present proceeding would be too glaring to be tolerated—no doubt of it. And the identity of the parties is the best and only answer to the preposition. McDougald is responsible for the delinquency of Mitchell, whatever it might be; and he received assets abundantly sufficient to enable him to account. And when he became guardian, he settled with himself, in contemplation of law, as executor; and if he did not, he

McDougald and others vs. Maddox and Wife.

ought to have done so; and in either event, his securities, or some of them, are liable.

Suits at Law have been brought against McDougald and his several sets of securities. Do the complainants show by them any special reason for resorting to Equity?

In *Alexander vs. Mercer et al.* (7 Ga. Rep. 589), this Court held that Chancery would entertain jurisdiction of a bill filed against the principal and both sets of sureties, praying a discovery of the amount of the *debtors* and the time when it occurred, in order to charge each set of sureties according to their respective liabilities on their bonds. But the bill in that case charged expressly "that *Mercer, the principal, was entirely insolvent.*" There is no such allegation in this bill. Indeed, it is not intimated but that McDougald, the principal, is abundantly able to respond to whatever recovery may be had, if any, against him. This being so, it matters not whether more or less is recovered in each particular case, and upon the several bonds upon which these different sets of sureties are sued. If McDougald is able to satisfy these various verdicts, should any be rendered, the interests of the sureties cannot be jeopardized; and no question will or can ever arise as to their respective rights and equities. Their principal stands between them and danger..

The remedy at Law, then, is ample, and the parties must abide by their election to go into that *forum*. The bill might be sustained for discovery alone, to aid in the prosecution of the actions at Law, but for the fact that there are several Common Law suits, and the discovery should have been sought separately for each case; and all the suits cannot, we apprehend, be embraced in one bill for this purpose.

Our judgment, therefore is, that the demurrer should have been allowed.

Hamrick et al. vs. Rouse et al. &c.

No. 6.—WILLIAM F. HAMRICK and others, plaintiffs in error,
vs. JAMES R. ROUSE and others, Commissioners, &c., de-
fendants in error.

- [1.] The Legislature of 1853-'4, passed an Act repealing the Act of 1851, which provided that the county site of Lee County should be made permanent at the town of Starkville, and authorizing the removal of the court-house from said town. Certain citizens and holders of real estate in that place filed their bill, praying that the commissioners who were proceeding under the Act of 1854, to lay off a new town, and remove the public buildings from Starkville, might be enjoined on the ground that the Act impaired the obligation of the contract by which they held their lots, and deprived them of vested rights: *Held*, that the establishing of seats of justice is matter of political arrangement or expediency, and that in such matters one Legislature has no right to bind all subsequent Legislatures, and all posterity; that the phraseology of the Act of 1851, therefore, did not amount to a valid and binding contract with those who owned or might purchase real estate in Starkville, that the seat of justice should never be removed; and that they purchased their interests qualified by the absolute right of the State, according to law, at any time, to change the seat of justice.
- [2.] By the removal of the court-house from Starkville there was no interference with any right the citizens had to the streets and squares in said town, which may have been dedicated to the public.
- [3.] The compensation provided in the Act of 1854, to lot holders, is gratuitous, and the right of the commissioners to remove the court-house does not depend upon the payment of that as a *condition precedent*. If the Inferior Court refuse to make it, the citizens have a remedy by which they may compel them to perform their duty.
- [4.] These commissioners are made the agents of the Legislature, to perform an act of political arrangement; and for that purpose, are clothed with the sovereign authority. If, in its performance, they have not selected an eligible site for the new town, or otherwise have failed in their duty, their discretion cannot be controlled by the Courts, unless they violate private rights; but the correction must be left to the Legislature.
- [5.] If the Court below refuse to grant a *supersedeas*, and upon hearing a bill of exceptions, this should be found wrong, the judgment will not be reversed upon this ground, where it could avail nothing to correct that error.

Application for injunction. Decision by Judge PERKINS, at Chambers.

In February, 1854, the General Assembly of the State passed

Hamrick *et al.* vs. Rouse *et al.* &c.

ed an Act removing the county site of Lee County from Starkville, and authorizing commissioners named to select a new site, &c. Compensation was provided in the Act to the lot holders in Starkville.

William F. Hamrick and other lot holders in Starkville, filed a bill against the commissioners praying an injunction, and alleging as grounds therefor—1st. That to allow defendants to proceed and remove the seat of justice, would violate the obligation of the contract between the State and the lot holders of Starkville, they or their grantors having purchased the lots from commissioners appointed under an Act of the Assembly of 1832, locating the county site at Starkville, and authorizing the sale of town lots. 2d. Because it would vest a vested right. 3d. Because it would be taking private property for public use, without just compensation; or any tender thereof, the commissioners having refused to pay the compensation provided in the Act. 4th. That by the permanent location of the town of Starkville, and the laying out a public square and streets, and selling lots therein, and the continuous use of the same for more than twenty years as the county site of Lee, there was a dedication to the public for that purpose, and could not be changed in derogation of private rights. 5th. Because the place selected for the new site, is not an eligible one, as near the centre of the county as possible, as provided and contemplated by the Act. Moreover, it was surrounded by swamps and marshes, which necessarily would render it unhealthy. 6th. Because the Act is unconstitutional and void.

The presiding Judge refused to grant the injunction, and error is assigned thereon.

Counsel for Hamrick and others applied, then, for a *sicca seseas*, until the decision of the Supreme Court in the cause, which being refused, is also assigned as error.

W. A. HAWKINS for plaintiffs in error, contended—

1st. That the removal of the public site of the county of

Lee from Starkville, and the selection of a new site, were acts of the Legislature, and not of the commissioners.

Hamrick et al. vs. Rouse et al. &c.

Lee, if allowed, will violate the obligation of the contract between the parties to said contract. *Charles River Bridge vs. Warren Bridge*, (7 Pick. 525, 532.)

2. What it will divest vested rights.
3. It will take private property for public use, without just compensation, or any tender thereof.
4. That the permanent location of the capital of said county, at Starkville, the laying out a public square, the opening and constituting streets, and selling lots thereon, and the continuous use thereof for more than twenty years, was a dedication to the public for said purposes, and cannot be changed or destroyed. (7 Wend. R. Wyman vs. Mayor of N. Y. p 500. Mayor and Council of Macon vs. Franklin, 12 Ga. R. 240. City of Cincinnati vs. Whiles, Lessee, Pet. R. 432.)
5. Said use for more than twenty years amounts to a franchise, and cannot be changed, in derogation of rights.
6. The Act of removal has not been pursued, the same providing for compensation, and none has been given or tendered.
7. The spot selected was not an eligible one—as near the centre of the county as possible, as contemplated by said Act.

R. F. LYON for defendant in error.

A Statute establishing a public corporation for public purposes, as a county, town or city, is not considered a contract within the purview of the Constitution, and the Legislature may change, modify, enlarge or restrain such corporation. (*Cobb vs. Kingman*, 15 Mass. 197. 18 Wend. 325. *State vs. Jones*, 1 Iredell, 414. 2 Kent. Com. 245. 3 Story's Com. 290.)

2. The Act of 1882, making permanent the seat of justice for the county of Lee at Starkville, made no contract with any person, nor did it confer any powers on other persons, to construct said the seat of justice, should never remain there. If that Act had conferred such powers or contained within itself such a contract, it would have been established with the sovereign power of successive legislation, and consequently void.

Hamrick et al. vs. Rouse et al. &c.

3. That Act simply made Starkville the permanent seat of justice, for the convenience of the public, and when it ceased to promote that object, the Legislature not only had the right, but it became its imperative duty to change the seat, so as to provide for the wants of the public. (*Cloud vs. Tucker*, 1 Blackford, 285. *Blackwell vs. The Board of Justices*, &c. 2 Blackford, 143. *Armstrong vs. The Commissioners of Dearborn Co.* *Callender vs. Mars*, 1 Pick. 430. *Att'y Gen. vs. Stevens, Sax. Ch. R.* 380. *Ind'a Co. R. R. vs. The State*, 3 Fred. R. (Porter) 421.)

4. By the Act of the Legislature, authorizing the removal, the defendants were made the exclusive judges of the eligibility of the new seat, and of its convenience for the public, and no person or power, except the Legislature, could control their discretion or action in these particulars.

5. The removal, by the Act, is not made to depend upon compensation of the lot holders in Starkville, for injuries done them thereby; but for that, an ample and specific remedy is provided by the Act, and those persons may pursue that remedy or not.

JAS. JOHNSON, for the same, was stopped by the Court.

By the Court.—STARNES, J. delivering the opinion.

[1.] Plaintiffs in error allege that the Act of February 7th, 1854, repealing an Act of December 26th, 1851, declaring that the county site and public buildings of Lee County shall be made permanent at the town of Starkville, and authorizing the removal of the court house therefrom, violates the obligations of the contract between those citizens who have purchased lots in said town, and the State; that it will deprive them of vested rights, and be taking from them private property for public purposes, without just compensation.

We hesitate in saying, that when the Legislature passes an Act phrased as is the Act of 1851, which provides that “a

county seat shall be permanent at a given place," it means to pledge the faith of the State, that it shall never be removed.

But if this be so, it is very certain that no Legislature has the right to bind all subsequent Legislatures, all posterity, as to any matter of mere political arrangement or expediency. The good faith of the State, or its people, under some circumstances, *in a moral point of view*, might become very decidedly pledged by the Legislature to such political arrangement; but still, as matter of contract, the Legislature could not bind posterity upon a subject of mere political expediency. Hence, if the Legislature of 1851 certainly intended, so far as they had any power over the subject, to fix the seat of justice at Starkville for all time, "yet," to use the language of Judge *Ruffin*, in the case of *The State vs. Jones et al.* (1 *Iredell*, 415,) "it would be entirely competent to the Legislature" (a subsequent Legislature) "to remove the seat of justice from that to any other place." And the reason is that which is there assigned by that distinguished Judge, "that this is matter of political arrangement and expediency, and necessarily the subject of Legislative discretion." This being so, when these citizens purchased in Starkville, they purchased an interest qualified by the absolute right of the State, at any time, to change the seat of justice, and must be held to have contracted subject to the law of the State in this regard.

For similar reasons, there were no vested rights divested by the removal of the court house, and no private property taken for public purposes, without compensation.

[2.] It was also maintained, that by the laying out of this village into streets and squares, the dedication of the same to the public, and the user of the same as such, for more than twenty years, these citizens could not now be deprived thereof.

This position might well be disputed, if it were necessary. If the State does not part with the right of eminent domain, when it grants its land to a private citizen, but may resume the same for public purposes, upon just compensation being made, it can hardly be said, that it has parted with its right of eminent domain, when it has dedicated land to the public, and

Hamrick *et al.* vs. Rouse *et al.* &c.

where political expediency makes it proper; that is, cannot, for the greater good of the public, withdraw its grant to the public.

But in this case, so far as this record informs us, there has been no interference, and none is meditated, with the right of enjoyment which the public have to the streets and squares of Starkville. It is only proposed to remove the court-house.

[3.] It seems that the Act of the Legislature, which authorizes the seat of justice to be removed from Starkville, gratuitously provides that compensation shall be made to those citizens whose property may be injured, in money or in lots, to be laid off in the new town. And it is now urged that such compensation has not been tendered or given, and that the seat of justice cannot be removed until this is done.

This compensation is not made a condition precedent. In fact, as we have said, it is but a gratuity. And upon it the political act which the commissioners are required to perform, has no dependence. If, after the seat of justice is removed, and within a fit and reasonable period, the Inferior Court of Lee County should not comply with the requirements of the Act and redeem the certificates which the commissioners of assessment are required to give to the owners of lots in Starkville, either "in money or in town lots of said selected site, at such rates as may be agreed upon by the parties at the new site," then there is an appropriate remedy, by which that Court can be required to do its duty.

It was urged that a tax of fifty per cent. on the State tax of Lee County, for the years 1854 and 1855, would not produce a sufficient amount for the liquidation of the claims for which this provision is made. We do not understand that satisfaction is to come alone out of this fund. The Inferior Court is required, by the law, to redeem these certificates, either in money or town lots, and this is a positive requisition of the Legislature. To assist them in doing this, they are authorized to levy this extra tax, "if they deem the same necessary for the purpose of carrying out the foregoing provisions."

[4.] It was also contended, that the commissioners should have been enjoined, because they had not selected an eligible

Dinkins et al. vs. Moore et al.

site for the new county seat, nor one near the centre of the county.

They were made the agents of the Legislature for the purpose of doing this act of political arrangement—for the purpose of selecting and laying off this new county site; and as such, they were clothed with a portion of the sovereign power and discretion. That discretion, so far as it depends upon the exercise of their judgment, no Court has a right to control, unless they violate *private rights*. The eligibility of that site, and whether or not it is near the centre of the county, are matters purely within their discretion and by their judgment to be determined. And if they have not wisely discharged the political duty assigned them, the Legislature must apply the correction.

[5.] It was also alleged that the Court below erred in refusing to grant the *supersedeas*, as asked.

The order of the Court would have been no stronger than the law. And that had already granted a *supersedeas*. The Court could have done no more. But if this refusal had been error, it could not now avail the plaintiff in error anything to have it corrected; so that it is unnecessary to say more about it.

Judgment affirmed.

No. 7.—Wm. J. DINKINS and others, plaintiffs in error, vs. THOMAS MOORE and others, defendants in error.

[1.] A deed witnessed thus:

"In the presence of

THEODORE GUERRY,

THOS. BIVINS, J. P.,

is sufficiently attested to admit it to record; and the conclusion of Law, from this general form of attestation is, that the subscribing witnesses saw the grantor sign, seal and deliver the deed, for the purposes therein mentioned.

Dinkins et al. vs. Moore et al.

Trover, &c. in Sumter Superior Court. Tried before Judge PERKINS, August Term, 1854.

This was an action by Dinkins and others, against Moore and Joseph White, for negroes. Plaintiffs offered in evidence a certified copy of a deed (the original being accounted for) made by Wm. P. Brown to one Mark Brown, for certain negroes to be held in trust. The deed concluded thus: "In witness whereof, I have hereunto set my hand and seal, this 8th day of May, 1827, and delivered the said negroes to the said Mark M. by the symbolical tradition of a pen-knife," and was attested thus: "In presence of Theodore Guerry, Thos. Biving, J. P." The Court rejected this copy, on the ground that there was no evidence of delivery, upon which the deed could have been properly recorded.

This decision is assigned as error.

W. A. HAWKINS and B. HILL, for plaintiff in error.

L. WARREN, for defendant in error.

BENNING, J. being related to one of the parties, declined to preside.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the copy deed properly rejected? The answer to this question depends upon the fact, of whether or not this deed was legally recorded.

Under the Act authorizing this paper to go to registry, it could only be done in one of two ways, viz: either proof of its execution by one of the subscribing witnesses, or the official attestation of a magistrate. This instrument was admitted to record upon the latter mode. The grantor concluded the deed in the usual form—"In testimony whereof, I have hereunto set my hand and seal," &c. adding, "and delivered the property, by the symbolic tradition of a pen-knife."

Creamer and Graham vs. Shannon.

The attestation is in this form—

"In the presence of

THEODORE GUERRY,
THOS. BIVINS, J. P."

It is stated, in the argument, that the Circuit Court held the registry void, on the authority of *Rushin vs. Shields & Ball*, (11 Ga. R. 636.) The deed, in that case, was recorded upon the affidavit of one of the subscribing witnesses, who swore "that he saw the grantor sign and seal the deed, and for the purposes therein named," &c. He failed to depose that he saw the deed *delivered*; and for that reason, this Court decided that the proof of the execution was insufficient.

To make the cases parallel, the form of attestation in the deed before us, should have been *signed and sealed* in our presence, or in the presence of, &c. The inference would then have been, that the subscribing witnesses did not see the deed delivered. But the difference between the case supposed and the one at bar is, that in the latter there is no form of words in the clause of attestation. And the point is, what is the legal import of a general attestation of this sort? And it is an inquiry of vast practical importance, for it will be found that a large portion of the conveyances in this State, are in this form.

Our opinion is, that under such an attestation clause, if neither of the witnesses be an officer, any one of them may prove its execution by making the usual oath. And that if one of them be a magistrate, the officer appointed by the law to perform this duty, the conclusion of law is, that he saw the instrument legally executed; that is, signed, sealed and delivered. And so we rule in this case.

Creamer & Graham vs. Shannon.

No. 8.—CREAMER & GRAHAM, plaintiffs in error, vs. HAWKINS,
SHANNON, defendant in error.

[1.] An account cannot be established by the oath of one of the parties, that he kept no clerk, but made the entries in the book himself; that the book of original entries has been burnt, and that the bill of particulars filed with the complaint, was transcribed from the book by himself.

Complaint, in Sumter Superior Court. Tried before Judge PERKINS, September Term, 1854.

This was a suit upon an account. Upon the trial, John Creamer, one of the firm of Creamer & Graham, swore that the firm had an original book of entries, which had been destroyed by fire; that he kept the books alone, having no clerk, and that he transcribed the present account from the book, and that this was a true transcript from the book. The Court rejected the transcript thus proved, as evidence, and this decision is assigned as error.

TUCKER & BEALL, for plaintiff in error.

HAWKINS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The plaintiffs in error, in this case, brought suit as merchants, against the defendant, on an open account, for goods sold and delivered to him during the year 1853. Upon the trial, it was proposed to show by Mr. Creamer, one of the firm, that the bill of particulars filed with the complaint, was a true transcript from the book of original entries; that said entries were made by himself, the partners having no clerk, and that the book containing these entries had been burnt in the late fire at Americus. The Circuit Court refused to allow this account to be established in this way; and that judgment is excepted to.

Creamer & Graham v. Shannon.

This Court, in one of its earliest decisions, held that the accounts of shop-keepers might be proven by themselves, where the book of original entries, kept by them, was produced—appeared to be fair upon their face, and the items were regularly charged, there being nothing upon the face of the books, themselves, to discredit them. This practice has obtained throughout the State; and, indeed, I might say, throughout the United States. And Mr. Greenleaf does not seem to consider it at variance with the principles of the Common Law. But it has always been conceded, that even the original books, kept by the party himself, and proven by his own oath, should be viewed suspiciously and scrutinized closely. And at best, are only allowed from the necessity of the case, as a part of the *casus gestae*.

But this case proposes to go one step further, and to permit the party to introduce in evidence, a transcript of the account from the books. We are unwilling to go this far.

It takes from the defendant the last and only check upon this very loose species of proof. So long as the books, themselves, are required to be produced, the defendant may, by their inspection, detect such proofs of a want of fairness and regularity, as to cast suspicion on discredit upon the account with which he is sought to be charged. But allow the party, in the absence of his books, to establish the demand by a copy claimed to have been drawn or transcribed by himself, and what protection has the defendant? Is he not delivered over, bound hand and foot, to his adversary? Better that the debt be lost, for want of sufficient testimony, as many rights are, than to establish a principle and practice so fraught with mischief.

But it is not true that the plaintiffs have no other mode by which they can establish their debt. Under the late Statute, they could make the defendant a witness, and compel him to testify. This account contains but seven items. Some of them leading ones, such as a pair of boots, &c. Is it not likely that the defendant would recollect these and admit their justice?

COLUMBUS, JANUARY 1855.

Brady vs. Hardeman & Hamilton.

No. 9.—~~Wright~~ BRADY, plaintiff in error, vs. HARDEMAN &
HAMILTON, defendants in error.

[1.] Where there is no process annexed to or accompanying the petition, and no waiver of process, the whole proceeding is radically defective, and advantage may be taken of it, at any stage thereof.

Complaint in Sumter Superior Court. Decision by Judge PERKINS, at September Term, 1854.

Hardeman and Hamilton filed their petition against Wright Brady; Brady acknowledged service, "waiving copy and copy process." After verdict and judgment, Counsel for Brady moved to set aside the verdict and vacate the judgment, on the ground that there was no original process issued in this case. The Court overruled the motion, and this decision is assigned as error.

B. HILL, for plaintiff in error.

DUDLEY, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] In this case, the plaintiff in error acknowledged receipt of the petition, and waived a copy of same and of process. But the process itself he did not waive.

In the case of *William G. Little vs. Bryant, Leggett, etc.*, docketed at Decatur Term, 1854, we have given, at some length, the reasons which we suppose influenced the Legislature in requiring that a process having, in substance, such requirements as prescribed by them should accompany every deposition, and in enacting, that if the defendant were brought into court by a proceeding issuing forth in any ~~different manner~~, it should nullify the whole proceeding, and (unless the process were waived,) render the same null and void. To what judgment we refer for these reasons?

SUPREME COURT OF GEORGIA.

Chappell & Co. v. Smith.

In addition to the reasons there assigned, I add, that one of the Bench holds the opinion that it was the intention of the Legislature, also, to require that the process should be annexed by the Clerk to the petition, the practice having been previously ~~against~~ ⁱⁿ this regard.

There was no process annexed or accompanying this proceeding. The defendant did not waive such process. The whole proceeding being therefore radically defective, advantage might be taken of it, at any stage of the case, and the judgment should have been vacated.

No. 10.—WATKINS CHAPPELL & Co. plaintiffs in error, vs. SEABORN A. SMITH, defendant in error.

- [1.] A misnomer in an appeal, is amendable.
- [2.] To make an Attorney at Law incompetent to testify of a fact, the knowledge of the fact must have been acquired by him, both during the relationship of client and attorney, and by reason of that relationship.

Complaint, in Randolph Superior Court. Decision by Judge ~~Thompson~~, October Term, 1854.

Watkins Chappell & Co. obtained a verdict against Seaborn A. Smith. Smith entered an appeal. The clerk, in making out the appeal, mistreated the plaintiffs—writing their names as "Watkins Chappell & Co." Plaintiffs' Counsel moved to dismiss the appeal on that ground. The Court refused the motion, and allowed the appeal to be amended, although the surety on appeal was dead and unrepresented before the Court. This decision is assigned as error.

Defendant relied on a receipt, in full, from William Taylor, plaintiffs' Attorney. Plaintiff proposed to prove by David Kiddoo, one of his attorneys, that subsequent to the death of

Chappell & Co. vs. Smith.

Taylor, defendant told him that "he was afraid he would have some difficulty about said case, as he had paid Judge Taylor \$600, in part, and had no shewing for it". The Court rejected this testimony, on the ground that David Kiddoo was an incompetent witness. This decision is assigned as error.

TUCKER & BEALL, for plaintiff in error.

A. HOOD, for defendant in error.

By the Court.—BENNING J., delivering the opinion.

[1.] The misnomer in the appeal, was amendable by the Act of 1850, to authorize "amendments to be made *instanter*, in all judicial proceedings, and for other purposes." The first section of that Act is in the following words: "That from after the passage of this Act, all misnomers made in writs, petitions, bills or other judicial proceedings, on the civil side of the Court, shall be amended and corrected *instanter*, without working any unnecessary delay to the party having made the same." (*Cobb's Dig.* 493.)

An appeal is a "judicial proceeding."

Indeed the misnomer would be amendable by the Act of 1818. (*Cobb's Dig.* 487.) See a case decided at Macon, in 1854, in which one Seymour was a party.

But although the Court was right in allowing the appeal to be amended, it was not right in rejecting the testimony of Mr. Kiddoo, the Attorney for Watkins Chappell & Co.

It does not appear that the statement of Smith, which it was proposed to prove by Kiddoo, was made to the latter, "both during the existence, and by reason of the relationship of client and attorney.". For aught that appears, the statement was made by reason of something else.

The Act of 1850 is a harsh, almost a penal one. If, therefore, it is doubtful whether a case falls within or without it, a

Dunn vs. Crozier, adm'r.

proper presumption will make the case fall without it. (*Collins vs. Johnson*, 16 Ga. R.)

So the Court should have received Kiddoo's testimony.

No. 11.—LEMUEL DUNN, plaintiff in error, vs. JNO. CROZIER, adm'r, defendant in error.

[1.] When a brief of the testimony is agreed upon by Counsel, and approved by the Court and ordered to be entered upon its minutes, at the term at which the application for a new trial is made; and the brief is omitted to be recorded by the neglect, forgetfulness, sickness of the Clerk, or any other cause, it is, nevertheless, a substantial compliance with the 61st Common Law Rule; and a *nunc pro tunc* order may be taken, at the hearing, to have the brief put upon the minutes.

Complaint and motion for new trial, in Randolph Superior Court. Decision by Judge PERKINS, Oct. Term, 1854.

This was a motion to dismiss a rule *nisi* for a new trial, on the ground that a brief of the evidence was not agreed upon in writing, and filed as required by the rule. It appeared that when the rule *nisi* was granted, the attorneys for both parties, in the presence of the Court, agreed upon a full and perfect brief of the evidence, and the Court assented to the same as such, and the Court passed the following order: "Upon hearing the foregoing motion, ordered that the rule *nisi* be granted, &c., and that further proceedings be stayed." And the papers were then handed to the Clerk, to be entered on the minutes. The Clerk failed so to do. Counsel for the rule moved to have the papers entered on the minutes *nunc pro tunc*. The Court refused that motion, and dismissed the rule, and this decision is assigned as error.

Dunn *vs.* Crozier, adm'r.

A. HOOD, for plaintiff in error.

L. WARREN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Ought the Circuit Court to have discharged the rule nisi, which had been moved and allowed for a new trial in this case, on the ground that a brief of the evidence had not been filed in compliance with the 81st Common Law Rule of practice? That rule requires that "a brief of the testimony in the cause shall be filed by the party applying for such new trial, under the revision and approval of the Court." And putting a liberal construction upon the rule for the convenience of Counsel, this Court has held that the written agreement of Counsel shall answer in the place of the approval of the Court.

Let us ascertain precisely, from the bill of exceptions, what transpired in this cause. It appears, then, from the certificate of the Circuit Judge, "that before the rule *ni. si.* was granted, the Attorneys for both parties, in the presence of the Court, agreed upon, the brief of testimony, and the Court then and there assented to the same as such, and that said papers, to-wit: the motion for the new trial; the brief of the testimony, and the order *ni. si.* granting a new trial, were then and there handed to the Clerk of the Court, to be entered upon the minutes thereof."

We assume, then, that the brief of the testimony, as agreed upon by the Counsel and approved by the Court, was ordered by the Court to be entered upon its minutes, at the term at which the application for a new trial was made; and it appears, by the affidavit of Mr. Bowers, that the brief now produced from the custody of the Clerk, is the same that was filed with him. Indeed, the identity of the brief, as well as its fulness and fairness, are not questioned. Under these circumstances, was it competent for the party making the application to have the brief signed on the minutes right off?

Curry vs. Gaulden et al.

Had this been done, there would have been a substantial compliance with the rule. It ought to have been done, because it was so ordered by the Court. Shall the failure of the Clerk to perform his duty from neglect, forgetfulness, sickness or any other cause, deprive these parties of their rights? We think not. It is the privilege of the Courts—yea, it is their high and imperious duty, to perfect their minutes by additions or erasures, so as to make them speak the truth, the whole truth and nothing but the truth. They should be, in fact, what they purport to be in theory, namely: the monument of the action of the Court.

Now does this opinion militate against the decision of this Court in *Tomlinson vs. Cox*, (8 Ga. R: 111.) There never was a brief of the testimony filed or offered to be filed in that case. Documents were referred to, which influenced the judgment of the Court in that case, which were neither filed nor offered to be filed. And while it is due to candor to admit that the interpretation of the rule in that opinion is, perhaps, a little more strict than its language warrants or justice requires; yet, I must say, that the decision itself was right, and that it does not conflict at all with the view now taken of this case.

No. 12.—DUNCAN CURRY, plaintiff in error, vs JOHN P. GAULDEN and others, defendants in error.

[4.] J G hired a slave from D C for one year, agreeing to pay him a certain sum therefor, and entered into a bond with securities, the obligation of which was that he would cause the slave to be forthcoming to the possession of D C on the 25th day of December, 1845, or pay the penalty of the bond. The slave ran away before the end of the year, and up to the time when action was brought upon the bond, the Master had not been able to retake him. Held, that this was a binding contract of hiring, and that the

COLUMBUS, JANUARY TERM, 1855.

Carry vs. Gaulden et al.

bailor was not discharged by the slave's running away, as this was not an inevitable casualty, against which no provision could be made; or that if it were, the character of this contract seemed to authorize the conclusion, that the bailor intended to protect himself against the possibility of this slave making successful escape from bondage, whilst thus hired to the bailee, by requiring this bond from the latter.

Debt, in Decatur Superior Court. Tried before Judge PERKINS, October Term, 1854.

This action was brought by Duncan Curry, on a bond given by defendants in error to him, at the time of hiring a negro man Allen. This bond was in the penalty of \$1,200, to be paid on 25th December, 1845. The condition of the bond was, that the obligors "shall cause Allen, a boy, to be forthcoming to the possession of Duncan Curry, on the 25th day of December, 1845. Then the obligation to be void, else to remain in full force". The breach was that the boy was not forthcoming. The defendants pleaded that the negro ran away without the fault of the hirer, and that he had used due diligence to recover him without success.

On the trial, the Court charged the Jury that defendant's plea, if proven, was a good defence to the action. This is the error assigned in this case.

R. F. LYON, for plaintiff in error.

K. SIMS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] This is a case of bailment by hiring. It is not a case where we are left to the general law of bailment, in order to ascertain the duty or charge which devolves on the bailee. He has, by his own contract, (the bond in question;) created this, and taken it explicitly on himself. The determination of this case, then, must turn upon the construction to be given to this instrument.

SUPREME COURT OF GEORGIA.

Curry vs. Gaultden et al.

The condition of that bond is, that the obligees shall cause Allen (the slave) to be forthcoming to the possession of Duncan Curry, on the 25th day of December, 1845.. Here is a direct and express undertaking, that the parties will have the slave hired, forthcoming to the possession of the hirer, or bailor, on the day specified.

The proof shows, that the slave was hired for the usual purposes, upon a plantation ; that he ran away ; that due diligence has been exercised to re-capture him, and the usual exertions made for this purpose ; and that he had not been re-taken at the filing of this petition.

The reported cases are somewhat in conflict, as to what will discharge a bailee who has entered into a specific contract of this description. On the one hand, it has been sometimes held, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and he hath no remedy over, there the law will excuse him—as in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused. But where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by contract. And therefore, if a lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. (*Paradine vs. Jane, Aleyn's B. 26 27. Brecknock and Abergavenny Canal Co. vs. Pritchard, 6 T. R. 720.*). And see *Story on B.* § 36, and various cases there cited.

Other Courts and distinguished authors have held, that in cases of specific contract to keep safely, inevitable casualty will excuse. (*Jones vs. B.* 43, 44. 45. *Coggs vs. Bernard, 2 Lord Ray. 909. Powell vs. Con.* 446. *Com. Dig. Condition, D. 1 L. 12 B. Co. Lit. 206,*)

It does not become necessary for us to decide between these two classes of cases, and these opposing views; for in our opinion, there was no inevitable casualty here, in the eye of the law, or of reason.

Cury vs. Guldens, et al.

The inevitable casualty contemplated by the law, is the act of God or of the State's enemies. The casualty in question does not fall within even the spirit of either of these—though it has been, in effect, so held in some cases decided in the Courts of Kentucky.

These cases, it seems, go in part upon the ground, that “the running away of the slave is a peril incident to the very nature of the property”. So it is “incident”, but not “inevitable”. It is incident, as “running away is a peril incident to the very nature of the property” in a horse or mule. But who would think of holding that one who had undertaken, by special contract, to deliver a horse on a given day, should be excused by proving that he had run away. It is true that the liability of a slave's escape is much greater: but this is only a question of degree, and it cannot be said, to be a casualty against which no provision could be made. It is not necessary to assume, that bolts and bars or chains would be necessary, in order to ensure the detection of the slave. Good treatment would, in most cases, do it quite as effectually. And such a contract as that before us might be made by the owner of a slave, for the express purpose of endeavoring to ensure such good treatment. It would not be understood as imputing harsh treatment of this slave to the hirer, in this case. There is nothing in the record to authorize this—and in what we have said, we are simply laying down general principles.

Another reason given for the decisions to which we have just referred is, that from the nature of the whole transaction, it was fairly inferable that the running away of the slave was not intended to be guarded against by the stipulations of the contract; and this is a much more satisfactory reason, distinguishing the cases from that before us.

In the first of these cases, *Singleton vs. Cairol*, (6 U. S. Mar. 528,) the action was upon a contract in writing; by which the defendant bound himself to pay \$100 hire for the slave until Christmas—to furnish clothing, and to deliver him to the order of the hirer at the expiration of the time. There the Court held, that “there was nothing in the writing of the

Curry vs. Gaulden et al.

covenant to justify the conclusion, that the parties, at the time of its execution, understood it as binding the appellees "to deliver the slave named, at all events." And hence, the Court considered that the delivery, *at all events*, was not undertaken.

In the case of *Keas vs. Yewell*, (2 Dana. 348,) the action was on a bond to have the slave forthcoming to answer a decree upon foreclosure of mortgage. The Court say "the covenant must be treated and construed with an eye to the subject matter about which it was entered into." To show what this was, they say, that "the apprehension and complaint of Yewell was, that Keas would remove the slave from the State before he could, by decree, subject her to the satisfaction of his demand;" and hence, it was held, that the escape of the slave, especially as the running away of the slave was a peril to which this property was "incident," from its peculiar nature, was not intended "to be guarded against by any stipulation in the contract."

In the case before us, there is nothing to authorize the inference, that such escape of the slave was not within the scope of the parties' intent, when the bond was executed. On the contrary, the character of the transaction, the specific and only stipulation, that the slave should be forthcoming at Christmas — the giving of bond and security to this effect, in a sum which was greater than the value of the slave, all seem suggestive of the fact that such escape was considered as possible, and was intended to be guarded against by the stipulations of the contract.

At all events, we do not see how, in the presence of such facts, we can say, that such was not the intention of the parties to this record. And therefore, we reverse the judgment.

Hannahan *vs.* Nichols.

No. 13.—JAMES A. HANNAHAN, plaintiff in error, *vs.* JAMES W. NICHOLS, defendant in error.

- [1.] A *ne exeat regno* issues only in cases in which the party against whom it issues cannot be held to bail at Law.
- [2.] A sells B a slave and takes B's note with a surety on it for the purchase-money. B and his surety fail to pay the note and have nothing from which to pay it, except the slave. B is trying to sell the slave, and A having sued B at Law on the note, sues him also in Equity, alleging in his bill that he has good reason to apprehend that B will sell the negro: *Held*, that this does not make a case for the interposition of a Court of Equity on principles *quia timet*.

In Equity, in Baker Superior Court. Decision by Judge ANDREWS, November Term, 1854.

Hannahan filed a bill, alleging that in 1853, by his agent, he sold to Nichols a negro for \$1100, and took his note, with one Delancey as surety. That Nichols agreed to furnish materials and build a gin-house for complainant by a certain time, for which he was to have a credit on the note of \$600. That this contract was the principal object of selling the negro; and Nichols was unable otherwise to pay for him. That Nichols had failed to comply with the contract, and that he and Delancey are insolvent and unable to pay the note, except by the proceeds of the negro. That Nichols was trying to sell the negro, so as to defeat the complainant; and complainant had good reason to apprehend that Nichols would sell the negro and leave the county and State, and thus defraud complainant. That he had commenced suit on the note in Baker Superior Court: Prayer, that Nichols might give bond and security for his appearance, to answer the said action on the note, as well as for the forthcoming of the negro, to answer the judgment at Law, and for the writ of *quia timet*.

On motion of defendant's counsel, this bill was dismissed for want of equity, and because complainant had an adequate Common Law remedy. This decision is assigned as error.

Hannahan vs. Nichols.

R. F. LYON, for plaintiff in error.

A. HOOD and L. WARREN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] “A *ne exeat regno* issues only where the claim upon the party going abroad is equitable, and it will be refused upon a mere demand at Law for money, ‘for there’ it is said ‘the defendant may be arrested and obliged to give bail, who will be liable unless they surrender him; and he may be as easily taken by that process as on a writ of ‘*ne exeat regno.*’” (3 *Daniel’s Ch. Pr.* 375.)

The demand, in this case, was a debt for \$1100, secured by a premissory note. It was one, therefore, on which Nichols, the principal in the note, might have been held to bail at Law.

The bill, therefore, contains no equity for a *ne exeat regno.*

Hannahan, by selling the slave to Nichols, and taking Nichols’ note for the payment of the price, parted with all title to the slave. He retained no lien on the slave for the purchase-money. The result of the transaction was to make him, Hannahan, a creditor, a mere creditor of Nichols’, and of Nichols’ surety, and to make these latter debtors mere debtors of him. The bill does not pray for a rescission of the contract, on the ground of fraud or on any ground—on the contrary, it insists on the rights given by the contract.. On a rescission of the contract, the title to the slave would, of course, revest in Hannahan. But whether, if the bill were one for rescission, the facts of it are such as to warrant an application for a receiver or other expedient for securing the property, i. e: the slave, pending the litigation, this Court is not called upon to decide.

The case, as made, is one in which the complainant shows no right, title or interest in the slave, for the forthcoming of which he prays the Court to compel the defendant to give security; and to such a case as that the *quia timet* principle has

Hannahan *vs.* Nichols.

never been extended. That principle has never been extended to the case of a creditor who could say no more than that his debtor had but barely property enough to pay the debt due to him, and that the debtor was trying to sell the property, so as to prevent it from becoming subject to the payment of the debt. Whenever there is a sale of property, without reservation of any sort, the effect is to give the purchaser absolute dominion over the property sold, and consequently to give him power to sell it. If the seller wishes to prevent any thing of that kind from being done, it is easy for him to prevent it at the time of the sale; before he parts with the property. Let him take a mortgage. The prayer of this bill is, in effect, that the Court will make Nichols, the purchaser, give Hannahan, the seller, a mortgage on the slave sold, and that long after the sale. The prayer is that Nichols may give a bond for the forthcoming of the slave; to *answer the judgment* which may be obtained at Law.

The *quia timet* power of a Court of Equity is quite a vague one, (and therefore a dangerous one) but it has never, as far as I can find, been applied to such a case as that made by this bill. This Court will not be the first to extend it to such a case. (1 *Maddock's Ch. P.* 218. *Story's Eq. Jur.* "Bills *quia timet.*")

But if the bill has in it no equity as a bill for a *ne exeat* and none as a bill *quia timet*, it has in it no equity at all. Whatever other relief a Court of Equity could grant, can be equally as well granted by a Court of Law, and granted in the suit on the note already pending in a Court of Law—the Court below.

The Court below was right, therefore, in dismissing the bill for the want of equity.

Rawson vs. Cochran *et al.*

No. 14.—WILLIAM A. RAWSON, plaintiff in error, vs. Wm. B. COCHRAN and others, defendants in error.

[1.] In a suit upon a promissory note, given jointly by two, and both of the makers are sued and served, and one of them dies before judgment, process of garnishment cannot issue against the joint debtors of the defendants, until the estate of the deceased party is represented; or such other proceedings are had as will disconnect the estate of the deceased defendant from the action.

Garnishment, in Dougherty Superior Court. Decision by Judge PERKINS, at November Term, 1854.

William A. Rawson brought an action against B. C. Green and K. C. Green. Pending the suit, B. C. Green departed this life. Before his death was suggested or there was a representation of his estate before the Court, the plaintiff, Rawson, sued out a summons of garnishment against Wm. B. Cochran and others, first making affidavit that "the estate of B. C. Green and K. C. Green are indebted to him," &c.

On motion, the Court dismissed the summons of garnishment, and this decision is assigned as error.

L. WARREN, for plaintiff in error.

SPICER & STROZIER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The case made by the record and by the admission of Counsel on the argument, is this: An action of assumpsit was brought in Baker Superior Court, by Wm. A. Rawson, against Bartlett C. Green and Kenyon C. Green, upon a promissory note. Bartlett C. Green died, and before any representation was had upon his estate, the plaintiffs sued out process of garnishment against DeGraffenreid and Cochran. Can this be done? The Circuit Judge held that it could not, and we think the judgment was right.

Williams et al. vs. Allen, executor, &c.

[1.] Waiving the discussion of the point, whether the assets of an estate may, by process of garnishment, be diverted from the due course of administration, by preventing them from coming into the hands of the legal representative, especially within the twelve months allowed by law, to ascertain the condition of the estate—I say, passing by this inquiry, we hold that important privileges are secured by law, to the defendants, which make it altogether improper to move in a cause, after the death of the party, and before the estate is represented. Bond has to be given to the defendants, before the garnishment can issue. This cannot be done until the representative was qualified. There is no obligee. By the Act of 1823, under which this proceeding was instituted, the defendant has the right to dissolve the garnishment by giving personal security for the debt. For this reason alone, to stay nothing of others which might be assigned; the proceeding was properly dismissed.

No. 15.—JANE L. WILLIAMS and others, plaintiffs in error,
vs. ALEXANDER A. ALLEN, executor, &c. defendant in error.

[1.] K W by deed of gift conveyed certain negro slaves to a trustee for "the use, &c. of J W and the heirs of her body, if any," and further provided, that "in the event that my said daughter J should die without child or children, then I devise the above property to be divided among my brothers and sisters." Held, that the words "child or children," as here used, are words of purchase, and that the whole provision, "in the event that my said daughter J should die, without child or children then," &c. being words explanatory, modifies the technical effect of the preceding gift to "J W and the heirs of her body;" and authorizes the inference that the words "heirs of the body" were used by the grantor to designate certain individuals answering the description of children at her death, and not as words of limitation. Held, also, that J W took an estate for life only in said slaves.

[2.] Where the words used in a deed were not appropriate to the creation of

Williams et al. vs. Allen, executor, &c.

A separate estate in J. W. in certain slaves therein conveyed; free from the
marital rights of any husband whom she might marry. But upon the inter-
marriage of J. W. with A. A. W. the latter received said property as his
wife's separate estate, and always treated it as such, and in his will recited,
that in consideration of her possessing the same as a separate estate, he
made no other provision for her: Held, that his executor was entitled to
deny the separate estate of the wife in the same, and its liability for her
debts, so far as the claims of her creditors were concerned, who had subse-
quently to the publication of the will, given her a credit upon the faith of
said separate estate.

[2.] In a proceeding by Bill in Chancery, for instruction and direction; filed by
the executors of A. A. W. in which he alleges that his testator had been mis-
taken in his legal rights. When he referred his wife to said property, as her
separate estate, and treated it as such in his will; and praying that the
same might be corrected: Held, that an executor is not bound by such a
recital in the will, if it were made under a mistaken apprehension by the
testator. But that in this case the testator did, by mistake, what in equity
and good conscience he should have done, and such a mistake a Court of
Equity will not correct.

In Equity, in Decatur Superior Court. Decided by Judge
PERKINS, December Term, 1854.

In 1836, Mrs. Kessiah Wood executed a deed, conveying
certain negroes to James H. Truluck, in trust—1st. For the
use of the grantor during her natural life, "then to and for the
use and benefit of my daughter, Jane Wood, and the heirs of
her body, if any, and in the event that my said daughter Jane
should die without child or children, then I desire the above
property to be divided between my brothers and sisters," &c.
Jane Wood afterwards intermarried with A. A. Williams, who
received the property as the separate estate of his wife, and
treated it as such so long as he lived, and in his will included
the following item. "I will and bequeath to my beloved wife
Jane, my two carriage horses and family carriage. This is all
I give her, she having a separate estate, amply sufficient for
her maintenance". After the death of her husband, Mrs.
Williams contracted debts on the faith of this estate, and gave
a mortgage on a portion of the property.

After the death of Williams, Alexander A. Allen, as his
executor—filing a bill, alleged the foregoing facts, and pray-

Williams et al. vs. Allen, executor, &c.

ed, the direction of the Court, and the construction of this deed; and in the meanwhile, enjoining the creditors of Mrs. Williams from proceeding against this property.

Upon the coming in of the answer, a motion was made to dissolve the injunction and dismiss the bill, for want of equity. The Court refused the motion. Exceptions were filed to that decision, and the questions argued in this Court depend entirely upon the construction of the deed, and the effect of the subsequent acts of Williams, as changed in the bill.

R. SIMS, for plaintiff in error.

R. F. LYON, for defendant in error.

By the Court. — STARNES, J., delivering the opinion.

[1.] The gift to the trustee, in this case, "for the use, &c. of Jane Wood, and the heirs of her body, if any", is in such terms as will pass an estate-tail, by the Statute *De donis conditionalibus*, &c. unless there is something else in the instrument, to show that the giver used the words *heirs of the body*, to designate certain individuals answering the description of *children or heirs, at the death of her daughter*.

It is the well settled doctrine of all the modern cases, that the words *heirs of the body*, may be construed as words of purchase, whenever there is anything in the instrument which shows that they were used to designate certain persons answering the description of heirs, at the death of the party. (*Doe vs. Colgear*, 12 *Eccat.* 548. *Doe vs. Jason*, 2 *Bligh*, 2. *Doe vs. Harvey*, 4 *B. & C.* 610).

In our opinion, such explanatory words are found in this deed, and in the immediate context: for the grantor goes on to provide, that "in the event that my said daughter Jane should die without child or children, then I devise the above property, to be divided," &c.

Now if these terms had to be construed in England, or by those rules of construction which favor the interests of the heir

Williams et al. vs. Allen, executor, &c.

at law; we grant that the signification of the words "children," here, would probably be controlled by the use of the words "heirs of the body," in the former part of the sentence: and this, although the word "children" is appropriately a word of purchase. But this construction would proceed upon the principle which has influenced the English Courts, by construction to deprive the words "dying without issue," or "dying without heirs," of their natural signification; viz.: a dying without issue at the death, and to hold that they import an indefinite failure of issue; which principle is, according to Mr. Lewis, in his treatise on Perpetuities; that, "in all cases of doubt in regard to the construction of limitations, that is to be preferred which most favors the interests of the heir at law." (Lewis on P. 191.) This is the reason, therefore, why the word "children," as a word of purchase, in such context, would be controlled by the words "heirs of the body," unless there was something else in the instrument to forbid it.

But, as we have said in the case of *Harris, administrator, vs. William Smith*, decided at the last term of this Court held in Savannah, this reason has been, in effect, repealed by the Legislature of Georgia, when primogeniture was abolished, and real and personal estate put upon the same footing, as to distribution, and estates tail prohibited. And if the reason has been repealed, the rule should no longer exist.

If the reason for such constructions be repealed, why should a Court, in this State, continue to perplex itself by wandering up and down the labyrinth of uncertainty which has been created by the English Courts; which, at one time, have been influenced by this reason, and have decided accordingly, even against the plain meaning of simple words; and at another, considering rather the interests of credit and commerce, have leaned so violently against it as to resort to trifling subterfuges in order to avoid its controlling effect? Why, where it may properly and reasonably be avoided, shall we persist in walking in the thick fog which has been thus created, when we may advance into the clear light and atmosphere of our own laws and policy?

Williams *et al.* vs. Allen, executor, &c.

It is in this point of view that we arrive at the conclusion, that when in the year 1836, in the State of Georgia, this grantor employed the word "children" in this instrument, she designed to use it in its natural sense, as a word of purchase, and that we must so receive it:

If so, we find the maker of this deed, in the use of the words, "in the event that my said daughter should die without child or children," having reference to her daughter's dying without children at her death; that is, living at her death. In such event, she could not have intended a perpetuity: and if not, she had not in her mind, at the time, an indefinite failure of her daughter's issue, as she most probably would have had, if she had designed to create an estate tail in her daughter, by the use of the words "heirs of the body." And hence, the inference is, that she did not intend such estate in the first instance; and that she used the words "heirs of the body," to designate certain individuals answering the description of children, at the death of her daughter.

But if she intended this property to pass to any children whom her daughter might leave at her death, and in the event that she should leave no children at her death, that it should be divided among her brothers and sisters, in such case, she could not have intended that daughter to take any thing more than a life estate in the property. And this, no doubt, was her intention.

[2.] The next question raised is, whether or not the life estate of the daughter, in this case, (Mrs. Williams, formerly Miss Wood,) was a separate estate, not subject to the marital rights of her husband.

We cannot sanction the position, that the words used were sufficient to create a separate estate in this property. But it appears, that it was treated as her separate estate, by the husband and wife, during the coverture and at the time of his death, or of the execution of this will; and an interesting question is raised, whether or not, under the circumstances, his representative is not estopped to deny this.

The executor, Alexander Allen, Esq. comes here alleging,

Williams et al. vs. Allen, executor, &c.

that as he has reason to believe, his testator acted under a mistake as to his legal rights, during his life, in treating this property as his wife's separate estate; and he prays that such mistake may be corrected—at the same time submitting himself to the directions of the Court, and avowing, what he no doubt feels, a desire to do nothing but his duty in the premises.

We have not had a moment's hesitation in perceiving, that so far as the interests and rights of the creditors are concerned, (who are represented here,) this executor can have no benefit from any such mistake by his testator; that as to them he must be estopped to deny the separate estate of the wife. These debts were contracted subsequently to the death of the testator, and the legal presumption is, upon the faith of this property, to which Mrs. Williams had been distinctly referred, by the will, as her separate estate. Her creditors had a right to look to it as hers, and not as belonging to her husband's estate, after his will was published, and it would be a great wrong on them, if the executor were now allowed to set up title to it. If the testator were ignorant of his rights, as is alleged, he should have taken steps to have informed himself in relation to them, before he made and published his will, and invited persons, as he has done, to credit her who had been his wife, upon the strength of this property. If he did not take the proper steps to be advised, it was gross negligence; for which these creditors should not be made to suffer. And an estoppel in pais, though not applying in cases where there has been a mistake without fault, yet does apply where there has been gross negligence equivalent to fraud. (1 Story's Eq. §§386, 391. *Brewer vs. Bos. & W. R. R. Co.* 1 Met. 483.)

[3.] We incline strongly to think, also, that as between the wife and this husband's executor, the latter, in a Court of Equity, should be held to the admissions made in the will, notwithstanding they may have been influenced by mistake.

It will not be denied, that if the trustee in this case, upon the intermarriage of Miss Wood with the defendant's testator, had invoked the interference of a Court of Equity, and asked a settlement of this property upon his *testamque trust*, that

Williams *et al.* vs. Allen, executor, &c.

such a settlement would have been decreed. Well then, when the Husband married, and when he executed his will and died, referring his wife to this property and setting it apart as her separate estate, he did what was equitable and just, and what confessedly a Court of Equity would have done, if it had been asked. It was not a *legal* settlement, but should it not be sustained in Equity? And now, when it is necessary for the executor to seek a Court of Equity, in order to have his testator's mistake corrected, should not that Court do what was equitable, and secure the property to the wife?

But there is a stronger reason why this should be done in this particular case. By his will, the testator makes no provision for the wife's maintenance; in effect, assigning as a reason that she was possessed of this separate estate. His words are, "I will and bequeath unto my beloved wife, my two carriage horses and family carriage; this is all I give her, she having a separate estate amply sufficient for her maintenance." It is to be inferred, that if he had not considered and treated this property as hers, he would have made some other provision for her. And it will be, indeed, a case of great hardship, if she is to be deprived of this.

Ought a Court of Equity to permit this hardship, if it have the right in any way to interfere? It has that right—for this bill is brought to correct a mistake of the law by the testator. This can be done by a Court of Equity only on equitable principles.

It is true that the recitals in a will by a testator, in which he erroneously states title to be in a third person, which, in fact, belongs to himself, do not amount to a devise or bequest of said property by the will. And this is so, even though it may appear that the testator was influenced in the disposition of his property by the mistake. (*Wright vs. Wyvill*, 1 *Vent.* 80. *Wright vs. Hammond*, 1 *Strange*, 447. 1 *Com. R.* 281. 2 *Eg. Ca. Abt.* 888.) This is undoubtedly a correct position. But this is a different case from that before us, where that title which the testator recites as being in his wife, in equity and good conscience should have been there, or would have

Shannon vs. Hyde and Clark.

been there conveyed, if a Court of Equity had been asked so to convey it. And where, in such a case, the testator's representative appeals to a Court of Equity to correct the mistake made in this recital, if the Court thus takes jurisdiction of the matter, it should decree according to the equities of the parties.

It only remains to say that the judgment of the Court below is affirmed, and that in our opinion a decree should be entered in accordance with the views we have expressed, for the protection of all the interests at stake in this case—care being taken to require bond and security of all persons who may purchase the life interest of Mrs. Williams in this personal property, when it is sold in payment of her debts, that the same shall be forthcoming at her death, to answer the demands of those persons who are entitled to the property after her death.

Nb. 16.—HARVEY SHANNON, plaintiff in error, vs. ROOSEVELT HYDE and CLARK, defendants in error.

[1.] Appearance of the defendant in *ca. sa.*, at any time in the term, before the Juries have been discharged, is a performance of the condition of a *ca. sa.* bond.

Ca. sa. in Sumter Superior Court. Decision by Judge PERKINS, August Term, 1854.

Wm. B. Stevens being arrested under a *ca. sa.* gave bond, with security, for his appearance at the next term of the Court. When the case was called, Stevens failing to appear, judgment was entered upon the bond against him and Harvey Shannon, his surety. Three days before the close of the term, Shannon, the surety, produced the body of Stevens, and moved to set aside the judgment and have an "*execetor*" entered in dis-

Shaw as. Hyde and Clark.

charge of the society. The Court refused the motion, and this decision is assigned as error.

There being no appearance for the defendant in court, the cause proceeded ex parte.

HAWKINS, representing BROWN, for plaintiff.

By the Court.—BENNING, J. delivering the opinion.

In cases of this sort, the Statute requires the condition of the bond to be for the appearance of the defendant in *c. ss.*, at the term of the proper Court, to be held next after the arrest, "then and there to stand to and abide by such proceedings as may be had by the Court, in relation to his, her or their taking the benefit of" the Statute.

The bond, in this case, is in substantial compliance with this requisition.

The condition of the bond having to be for the appearance of the defendant, to abide by such "proceedings" as may be had by the Court, it is not performed unless the defendant appears time enough in the term to admit of "the proceedings" by which he is to abide, to be had.

And of these proceedings it may happen that an issue for a Jury, on a suggestion of fraud by the plaintiff in *ca. ss.* may make a part.

The condition of the bond, therefore, is not performed unless the defendant appears time enough in the term to admit of such an issue being formed, and if not continued, being tried by a Jury. That is to say, the condition is not performed, unless the defendant appears before the Juries shall have been discharged. (*Cobb's Dig.* 386.)

[1.] But on the other hand, if the appearance is at any time before the Juries are discharged, the condition is performed. And appearance, at such a time, makes every object of the Statute capable of being accomplished. As long as the Court has

Tuggle, adm'r, &c. vs. Wilkinson, adm'x.

The Juries, &c. know what will enable it to transact all "the proceedings" of which the case is susceptible.

In this case, the surety having produced the body of his principal, the defendant in ca. sa. three days before the close of the term, produced him, it is to be presumed, before the Juries had been discharged. He therefore produced him in season.

The Court, therefore, should have granted the surety's motion, to have the judgment set aside and himself exonerated from the bond.

It is not meant to be said, that if the case is not called until after the Juries shall have been discharged; an appearance at the time when it is called, will not be sufficient.

No. 17.—THOMAS S. TUGGLE, adm'r, &c. plaintiff in error, vs.
SARAH WILKINSON, adm'x, &c. defendant in error.

[1.] The Act of 1847, to simplify and curtail pleadings, applies to cases for or against an administrator.

Complaint, &c. in Lee Superior Court. Decision by Judge PERKINS, June Term, 1854.

The Court below dismissed the plaintiff's suit, on the ground that the Act of 1847, "to curtail and simplify pleadings at law" did not apply to cases for or against an administrator. This is the error assigned.

W. A. HAWKINS, for plaintiff in error.

J. C. STROZIER, for defendant in error.

STROZIER, for defendant in error.

COLUMBUS, JANUARY TERM, 1835.

Tugge, adm'r, &c. vs. Wilkipson, adm'x.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The *Forms* prescribed by the Act of 1847, to simplify pleadings, are preceded by the alphabetical statement of the supposed parties, thus: "A B. vs. C D." And the argument is, that an action by one administrator against another, cannot be brought under this Act. That it was intended for individuals, only in their own right.

On the contrary, these letters were intended to represent the whole party—plaintiff and defendant—whoever they may be. This restricted construction would prevent a suit, by two plaintiffs against one defendant, or one plaintiff against two defendants, or two plaintiffs against two defendants. Is not this sticking in the *letter* literally?

This complaint is well brought under Jones' *Forms*. And so far from construing the Act strictly, it should be liberally interpreted, intended as it was to facilitate the recovery provided by law for the redress of wrongs. And it is a feather in the cap of its author, that the commissioners sent to this country from England, to look into the mysteries of American Law Reform, have transmitted a copy of this Act home, and it now stands upon the Statute Book of the British Parliament as a law of the Realm.

But we hold that this writ was good under the Judiciary Act of 1799. From the first settlement of this Colony in 1720, certainly from the adoption of the first Constitution of 1777, our people have exerted their ingenuity to the utmost to simplify legal proceedings. When the Act of 1799 was passed, it was fondly supposed, no doubt, that this darling object had been accomplished. But the Judges of that day, unable to throw off the shackles of their professional education, instead of construing this Act by itself, as they should have done, read and enforced it in the light of the British books, adhering as pertinaciously as ever to the forms prescribed by the British Courts. And then commenced another struggle, as is evidenced by the Act of 1810 and like legislation. Finally, in 1847,

Miller *vs.* Saunders *et al.*

a heavy blow was aimed at fictitious forms, the use of which have had, I have no doubt, the effect to weaken the force of moral truth. And now we are called upon to fritter away this Reform Act.

It is needless to mince matters any longer—the age of quirks and quibbles is past in Georgia. The giant Truth can no longer be tied down by the small cords of technicality. We sit here, in judgment upon men's rights, and not to pass upon the comparative ingenuity and skill of their Counsel. The Legislature and the Courts have combined to lay the axe to the root of the evil, and under their joint blows this Upas tree of fiction and folly must fall. Henceforth, form is nothing—substance is every thing. Technicalities will soon be regarded as the mere legal ~~small~~ worship of a by-gone period.

This will, tested by the Common Law Forms, wants only the super *re quisitionis*, and who cares a fig for that?

No. 18.—JAMES S. MILLER, plaintiff in error, *vs.* IRVING J. SAUNDERS and others, defendants in error.

[1.] Where an exhibit, of a marriage settlement is made to a bill in equity, and the defendant is called upon to answer to the best of his knowledge, information and belief, as to its execution, and he answers that it may have been executed as alleged, but he says that complainant may be held to strict proof thereof: Held, that this answer is evasive; that he should answer as interrogated, according to his knowledge, information and belief in the premises.

[2.] Where the defendant is interrogated as to the title of a slave, and fails to answer, and insists that he is not bound to answer, because the complainant has no title to the slave: Held, that the Court will not look into the question of title, upon argument of the sufficiency of the answer, and potentially when the question has not been discussed by the Counsel, but will require the answer upon this point.

[3.] The defendant may answer all questions so far as articulated in the bill.

Miller *vs.* Saunders *et al.*

[4.] But the defendant is not required to answer an interrogatory, for which no foundation has been laid in the stating part of the bill.

In Equity, in Dougherty Superior Court. Decision by Judge PERKINS, December Term, 1854.

The error complained of was the sustaining of exceptions to the answers of plaintiff in error, to a bill filed by the defendants in error.

1. The bill charged the execution of a marriage contract between James S. Miller and his wife, a copy of which was attached to the bill. The defendant answered that this copy "may be a substantial, if not a true copy of the deed, but prayed that complainant be held to the strict proof thereof." The Court held this answer insufficient.

2. The answer failed to state the value of a negro *Elias*, included in the deed, or his annual hire. It set up absolute title in Elias, in defendant. The Court required him to answer.

3. The bill charged, that there had been a settlement between the complainant and defendant, which defendant had violated by fraudulently causing a *fi. fa.* to be sent to Dougherty County, and levied on a portion of the negroes. The answer was silent as to the sending of the *fi. fa.* to Dougherty. The Court held it a material allegation, and required an answer.

4. One of the interrogatories in the bill was unanswered—the stating part of the bill being silent as to this interrogatory. The Court ordered it to be answered.

Upon these decisions error is assigned.

SCARBOROUGH, for plaintiff in error.

L. WARREN, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

This case comes up to us, by the decision of the Court below, upon exceptions to an answer in Chancery.

Miller vs. Saunders *et al.*

[1.] The first objection is, that the Court erred in deciding that the answer was defective, because the defendant 'had' not answered whether or not the copy of a marriage settlement exhibited, was a true copy of the original.

The defendant has been called upon, in the usual way, to answer upon this point according to his knowledge, information and belief, so as to save proof of execution to the complainant. He has not answered according to his information and belief, but has replied evasively, saying that the copy exhibited "may be a substantial, if not a true copy;" yet, praying that the complainants "may be held to strict proof;" and again—that "it may be proved as charged, that said marriage settlement was executed in manner and form as set forth, but respondent requires strict proof and authentication." This is not a proper answer. The complainant is entitled to the knowledge, or belief of the defendant upon this subject, and he must so answer.

[2.] The defendant admits that he has not answered as to value of the slave *Elias*, but denies that this is material.

It is true, that the title of the complainant to this slave is here put in question. And if he be not entitled to recover the slave, the value of the same cannot be material to him. But this question may be more appropriately decided elsewhere; and in the meantime, an answer to this point is but a slight matter. At all events, this question of title was not discussed before us; and in the absence of discussion, we deem it more expedient that the defendant should answer this comparatively unimportant question, than that we should decide this important point.

[3.] It is complained, also, that the defendant has not answered whether or not he procured the *f. fa.* in favor of Joseph Ring against himself, and Durham and Saxon as securities, to be sent to the County of Dougherty, there to be levied. To this he replies that it, too, is immaterial.

The answer to this inquiry is material, in our opinion. The bill charges fraud against the defendant, in that, he entered into a compromise with the complainants of a suit for, and

Miller *vs.* Saunders *et al.*

claim to certain negro slaves, and delivered the same up to the complainants, and that he subsequently conspired with Durham and Saxon, pretending that as securities they had paid off this *f. fa.* against him, when, in truth and in fact, this was not so; and prevailed on them to aid in having the same levied on these negroes, that they might be condemned as his property.

If this be true it is very material; for if Durham and Saxon have only a *pretended* interest in said *f. fa.* and are pressing it for his benefit, this cannot be permitted. We are inclined to think, too, that even if Durham and Saxon have paid off this execution as securities, and there is other property of Miller, out of which they may make their money, and yet, by conspiring with him they are endeavoring to condemn this property for his debts, inasmuch as he is estopped to deny the title of the complainants to the same, a Court of Equity will intervene and turn the execution upon other property. And in this point of view the answer is proper.

[¶.] But we cannot sustain the Court below in requiring an answer to the interrogatory, as to the length of time during which Mrs. Miller was sick, before her death. Upon examination, we find that no foundation is laid for this interrogatory in the stating part of the bill; and no answer can therefore be required of the defendant, on this point.

This rule has been too well settled by Chancery practice, and the repeated decisions of this Court, to need that we should add any thing to what we have said. On this ground the judgment is reversed.

Griffin, adm'r, &c. vs. The Justices, &c.

No. 19.—BENJAMIN F. GRIFFIN, adm'r, &c. plaintiff in error,
vs. THE JUSTICES OF THE INFERIOR COURT OF BAKER
COUNTY, defendants in error.

- [1.] The over-ruling of a demurrer to a declaration, is not a ground for a new trial, even if the over-ruling be wrong. If the cause of demurrer be such that the demurrer should have been sustained, it may or may not be sufficient to support a motion to arrest the judgment.
- [2.] The acknowledgment of a debt made by an executor, if made before the debt has become barred by the Statute of Limitations, is sufficient to take the debt out of the Statute of Limitations.

Assumpsit and motion for new trial, in Baker Superior Court.
Decision by Judge PERKINS, November Term, 1854.

This was a suit by the Inferior Court of Baker County against Griffin as the administrator of Sikes, upon a promissory note made by Sikes during his life-time, and upon which there was a credit of an amount paid by the administrator since the death of Sikes, and before the bar of the Statute of Limitations had attached. There was a verdict for plaintiffs and a motion for a new trial on various grounds, reducible to two—

1st. Because the Court erred in over-ruling defendants' demurrer to the plaintiff's declaration.

2d. In holding and charging, that "although the administrator could not make any promise or do any act to bind the estate of Sikes, by creating a liability, he could, by acknowledging the debt (there being a subsisting liability) and making a payment thereon, continue the liability of the estate, so as to take the case out of the operation of the Statute of Limitations."

These were the errors assigned and considered in this Court.

STROZIER, for plaintiff in error.

LYON & CLARK, for defendant in error.

By the Attorney. — BENNING, L. delivering the opinion.

[.] The over-riding of a judgment by a declaration, notwithstanding a stay, is no ground for a resumption, if the cause of damages be such that the defendant should have been justified instead of overruled, that cause may be such as to be entitled to a resumption before the judgment. If it cannot be made out of an arrest the judgment, it cannot be made out of at all. It doubtless, cannot be made use of to get another *de novo* trial.

In this case, however, the declaration stands to the Crown to be sufficient.

The acknowledgement of a debt, by the debtor, before the debt has become barred by the Statute of Limitations, takes the debt out of that Statute.

This is the general rule. (*Yea vs. Fowrster*, 2 Barr. 1029, *Bryce vs. Broome*, 4 East. 599. *Park vs. Dugree*, 14 Ga. R. 663.)

In the two former of these cases, the acknowledgement was not made until after the debt had become barred, and yet it was held, to be sufficient to take the debt out of the Statute.

But it is insisted, that if the debtor who makes the acknowledgement of the debt happens to be an executor, the same that is made is excepted from the operation of the general rule; and in support of this position is read a late English Case, which is certainly in point: the case of *Tulloch vs. Dunn and another, executors*, (Rosen v. Moody, 4 P.6.) But this is a nisi prius decision, and one, which rests upon the cited authority or stated reason—one for which no reason could be stated, as I think, which could not be as well stated for the case of acknowledgement made by any debtor, and one, which is in variance with the law, as that was understood and impliedly declared by the law making power—Parliament, a few years after the judgment was made. This implied declaration, of what was the law, was made by Parliament in "Lord Thurlow's Act" passed in the 9 George IV. A part of that Act declares, "that in actions

Before, after, before the Justice, &c.

of debt, or upon the case, grounded upon any simple contract, no acknowledgment or premise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof; unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party to the chargeable thereby: and that where there shall be two or more joint contractors, or executors, or administrators, of any contractor, or their joint contractor, executor or administrators, shall lose the benefit of the said enactments, or either of them, so as to be chargeable, in respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them: provided, always, that in actions to be commenced against two or more such joint contractors, executors, administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to each defendant or defendants against whom he shall recover and for the other defendant or defendants against the plaintiff".

Now it is impliedly declared, by expressions in this part of the Act, that the old law was such as to put acknowledgments made by executors and administrators, upon the same footing as those made by original debtors; and so that it was such as to give to acknowledgments made by them, the same effect as it gave to acknowledgments made by original debtors. And the new law which the Statute makes, continues in existence this principle. It gives efficacy to a written acknowledgment, when made by an executor or administrator, to the same extent that it does to an acknowledgment made by an original debtor. But ~~not~~ ^{not} prius case admits that a promise made by the executors would be sufficient. But what reason is there to give

Lessee Veasey et al. vs. Graham et al.

obligey to a promise which does not equally exist to give efficacy to an acknowledgment? The continued existence of the debt is the main thing. And if, in any case, the acknowledgment of the continued existence of that, without a promise to pay it, is sufficient to charge the debtor, if he is an original debtor, why should not the acknowledgment of the continued existence of the debt, without any promise to pay it, be also sufficient to charge the debtor, if he happens to be an executor or administrator?

The facts of the case are, in one respect, of a different character from that of the facts of the case before this Court. In that case, the acknowledgment of the executors was by "words only". In this the acknowledgment was by an actual payment of a part of the debt—a much more safe form of acknowledgment.

Then, it does not appear, in that case, but that the acknowledgment may have been made after the debt had become barred.

[2.] Upon the whole, this Court feels bound to disregard this case, and to consider the law to be, that an acknowledgment made by an executor, at least if made before the acknowledged debt has been barred by the Statute of Limitations, is sufficient to take the debt out of the Statute.

And therefore, we have to say, that in our opinion, the charge of the Court was not erroneous.

No. 20.—THE LESSEE OF EZEKIEL VEASEY and others, plaintiffs in error, vs. JOHN GRAHAM and others, tenants.

[1.] A deed made by the President, and countersigned by the Cashier of the late Bank of Hawkinsville, is a good conveyance of land.

[2.] The law looks with suspicion upon a contract made between the trustee and cestus quod trust; and with still greater suspicion a purchase made from

Leasees V. Vandyke et al. vs. Graham et al.

Bank, as trustee; still, such contracts are not absolutely void, as interpreted by the policy of the law, but voidable only.

[3.] Notice to the cashiers of a bank, is notice to the bank itself.

[4.] The purchase of slaves, and the employment of overseers in planting lands, is not such an occupancy as is customary with banks.

Ejectment, in Dougherty Superior Court. Tried before Judge PEAKINS, November Term, 1854.

In this case, both plaintiffs and defendant claimed under the Bank of Hawkinsville, the land in dispute. The defendants in error offered in evidence a deed to the land, purporting to be made by the Bank of Hawkinsville, dated 4th August, 1842, for the consideration of \$2,000, conveying this land to John Rawls. The deed was signed by John Rawls, President, and countersigned by George W. Hines, Cashier. It was recorded in 1853. Plaintiffs in error objected to its introduction—

1st. Because Rawls had no authority to make the deed, the charter requiring a board of at least four directors to transact such business; and there was no order on the minutes authorizing this deed to be made.

2d. Because Rawls, as President, held this land as trustee for the stockholders and creditors of the bank, and committed a breach of trust in making this deed; and the deed is, hence, null and void.

3d. Because no corporate seal is attached to the deed.

The Court admitted the deed, and this decision is assigned as error.

It appeared in evidence, that Rawls took possession of the land, and by his agent and negroes, cultivated the same from the date of the deed.

Other errors were assigned, but the decision of the above controverted them.

R. F. LYON and SCARBOROUGH, for plaintiffs in error.

SIMPSON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question we propose to examine in this case is, was the deed from Rawls, as President of the Hawkinsville Bank to himself good, either as title or color of title, to protect his possession, which, it is conceded, continued for more than seven years?

It was assumed in the argument, that the concurrence of four directors was necessary, by the charter of the Hawkinsville Bank, to convey land. There is no such provision in the charter. By the 3d of the fundamental rules of the constitution of said corporation, it is provided, it is true, that not less than four directors shall constitute a board for the transaction of business. (*Prince*, 107.) But by a subsequent clause in the charter, it is declared that "the bills obligatory and credit notes, and all other contracts whatever, on behalf of said corporation, shall be binding upon the company, provided the same be signed by the president and countersigned or attested by the cashier of the said corporation," &c. (*Prince*, 108.)

This deed, then, in point of form, was sufficient. It is, *prima facie*, a good deed.

[2.] It is contended, however, that the president of the bank could not make a good deed to himself; and therefore, that this deed is, *ipso facto*, void. We do not so understand the law. It looks with suspicion, it is true, upon contracts between trustee and *testis que trust*. With still more odium upon contracts made by a trustee with himself. Still, such contracts are not absolutely a nullity. Lord Erskine, while Chancellor, decided that such deeds were void. But this decision was afterwards over-ruled. See *Hill on Trustees*, New Edⁿ, 159, and the authorities there cited.

Are there not circumstances connected with this case, which go far to relieve it from suspicion? The deed was countersigned by the cashier. That officer is an important functionary in a bank. In most menied institutions, he is pretty much the whole of it. The charter made it his duty to be a party

Lessee Veasey *et al.* vs. Graham *et al.*

to all contracts in which the corporation was concerned. This was required for important purposes; and amongst the rest, to be a check upon the acts of the president. It may be assumed, that the cashier united in this sale—participated in its consummation. It was his duty to have received the \$2,000 purported by this deed to have been paid for the land. The purchase money was paid or it was not. If paid, the sale cannot be set aside without, at least, refunding the purchase money or offering to do so. The receipt of the money and the retention of it, for such a length of time, is such an acquiescence in the sale, as to amount to a confirmation.

But suppose, on the other hand, that the price was not paid, was it not the duty of the cashier to have notified the directors of the fact? In the absence of all proof then, upon this point, is not the transaction relieved from the suspicion which the law attaches to this class of contracts?

But suppose we are wrong in this view of the case, and that the deed is not good as title, is it not good, as the Circuit Court held it to be, *as color of title*?

The objection to it, in this aspect is, that before the trustee, John Rawls, could be permitted to hold this land adversely to the bank, the *cestui que trust*, he must give notice that he had repudiated the trust, and that he occupied the land in his own right.

[3.] The cashier had actual notice of the fact, because he aided in executing the title. To whom else should notice have been given? The stockholders, or the directors; or both? We know of no such practice.

This Court ruled, in the case of the *Bank of St. Marys vs. Menford*, (6 Ga. R. 44,) that notice to the cashier was notice to the bank.

[4.] But in addition to this express notice, was not the very nature of the possession, itself, notice of an adverse holding? Was it ever known that a bank bought negroes—employed overseers, to farm lands? And yet all this was done by John Rawls, from the date of his deed to the trial of the action. Could the bank have been misled or left in doubt as to the

Tompkins *vs.* Tigner.

character of Rawl's occupancy? For whom and for whose use and benefit this land was cultivated?

No. 21.—**JPHN G. TOMPKINS**, plaintiff in error, *vs.* **YOUNG F. TIGNER**, defendant in error.

[1.] A hires to B two slaves for a year, and takes B's note for the hire. Before the end of the year, A, without leave from B, takes back one of the negroes. This B pleads as a partial failure of the consideration of the note: *Plea held to be good.*

Complaint, in Marion Superior Court. Tried before Judge CRAWFORD, August Term, 1854..

This was an action on a note for one hundred and seventy-five dollars, given for the hire of two negroes. The defence was, that the plaintiff had, without consent of defendant, taken one of the negroes away from the possession of the defendant, before the year expired, for which he claimed a deduction from the note. The Court over-ruled the defence, on the ground that for such conduct the plaintiff was liable in a different form of action. This decision is assigned as error.

ELAM, represented by B. HILL, for plaintiff in error.

OLIVER, for defendant in error.

By the Court.—**BENNING**, J. delivering the opinion.

[1.] One of the pleas was, that the note sued on had been given for the hire of two negroes, for the year 1852—a man at one hundred dollars—a woman at seventy-five dollars; that

Tompkins vs. Tigner.

the plaintiff had agreed for the defendant to have the negroes during the year 1852; that in consideration of the plaintiff's agreeing to this, the note had been given to him by the defendant, and that on the 18th of September, 1852, the plaintiff, without the defendant's consent, took the woman from the defendant, into whose possession she had never returned—whereby, as the defendant insisted, the consideration of the note had partially failed.

Proof was received which supported this plea.

Then, this proof, on the motion of the plaintiff, was ruled out, the Court holding as follows: "that if it (the testimony) showed anything, it was that the plaintiff was a trespasser;" "that hiring a negro was a temporary purchase, and the owner had no right to the possession without the consent of the person hiring—if he possessed himself without his consent, he was liable in another form of action."

This, no doubt, is a true statement of what, in such a case, the law is. Tompkins, the hirer, might have brought an action of trover for the negro, against Tigner, the moment the negro was taken by Tigner. There can be no doubt about that, I think. (*Roberts vs. Wyatt*, 2 *Tarrant*. 268; and see *Story on Bailments*, §§396, 413.)

But admitting this to be so, it does not follow that this testimony ought to have been excluded; for although it be true, that the hirer might have maintained trover for the injury, yet it is equally true, that for it he might, if he had pleased, have maintained *assumpsit*. The case was one of those in which the same thing may, perhaps, be considered to constitute both a *tort* and a breach of contract. The contract was, that the hirer was to have the negro for a full year. Before the end of the year, the owner, without leave, took back the negro. This was both a breach of the contract and a trover and conversion—a trover and conversion, because the hirer's special property in the slave, acquired by the contract, had not expired.

And there are many cases of *tort*—pure *tort*, in which the *tort* may be waived and *assumpsit* or *detinue* brought. It is well

卷之三

“*Amor ist die Macht des Menschen, und Menschen sind: “* Wenn
diese Worte den Sieg überzeugen können, so wird der Friede nicht mehr
entfernen, durch das ewige Anstreben des Menschen.”

which you will see that Tassie, the dog, might, in
the case, have sustained as great an injury as the
injury.

- But if it was at his option to bring a suit upon it, it was of course at his option so treat the injury, not as a tort, but as a breach of contract.
 - His option to treat the injury as a breach of contract.

Treated as a breach of the contract, the injury amounts to

Treated as a breach of the contract, the injury amounts to a simple failure of the consideration of the note.

"What was the consideration of the note?" The owner undertook, that as far as in him lay, the Master should have the use of the two negroes for the space of a year. This undertaking is implied in the contract of hiring for a year. This was the consideration.

When the year was over, the owner, by his own act, which
was, after the former, deposited the sum of the sum ahead of the
balance for the rest of the year. "This you will find of him-
self taking, and it clearly indicated to a partial failure, of the
consideration for which the note had been given.

"That, having been classified as a partial failure, any consideration, evidence in support of the particular hypothesis excluded.

The evidence as English suggested the action. To evaluate it, other effects, objective and subjective, must be considered. The first deals with the question of whether or not there is anything in the decision of the International Court of Justice (*Id.* 64, p. 100) on the decision of the International Commission of Jurists, in so far as it stands for a just, fair and peaceful settlement of the prior dispute, and the second with the decision of the International Commission of Jurists, through the opinion of its former members, according to which, for example, although the court recommended that the claim should be rejected, the claimants could, in fact, have had the same

White *vs.* Waller.

term, he does not take, that he will not do anything wrong, deprive the hirer of the use of the slave for the term.

A similar rule prevails with respect to the slave-hireman. The tenant may show that he has been visited at the time of the required payment by the lessor, or by a witness having full knowledge, and that the party thus present advised (Constitutional Law and Cases, 2d Ed.)

No. 22.—BENJAMIN F. WHITE, plaintiff in error, *vs.* JAMES WALLER, defendant in error.

[1.] The order in which evidence is to be introduced, is for the discretion of the Court.

[2.] A party moves for a new trial on the ground of newly discovered evidence, and supports his motion by an affidavit of his own, in which he swears that he had told his master that he, the last January, though he heard the other party say that which is contained in the newly discovered evidence; Held, that the ground of the motion is not sufficiently verified.

a. Complaint, in Harris Superior Court. Tried before Judge Chapman, at September Term, 1854.

Waller sued White for \$1000, judgment for \$1000, or better. The defense was, partial failure of consideration. At the trial, defendant introduced a witness to prove the bill of confession, which, it appears, the slave signed while defendant first professed that the slave had discharged him. Defendant denied that this was the case, and plaintiff denied the witness, that a person representing himself as the agent of the slave presented the note for payment which passed before the date of the bill of confession. The note left due in June, 1854. Defendant then offered again to

White & Walker.

prove the failure. The Court rejected the evidence, and defendant excepted.

Defendant moved for a new trial, on the ground of newly discovered evidence in this—that the defendant had been informed, since the trial, by one Benjamin Miller, that one Dennis Miller told him that Igon had acknowledged to him, since the commencement of the suit, that he was still the owner of the note. The affidavit of defendant verified this motion. The Court refused the motion, and defendant excepted.

On these several exceptions affidavits were assigned.

MORLEY & HILL, for plaintiff in error.

HAMPTON & KING, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The order in which a party is to introduce his evidence, is to be regulated by the discretion of the Court.

In this case, no special reason was assigned to the Court, for the wish to prove, first of all, the partial failure of consideration pleaded. Had any such reason been assigned, it would, it is to be presumed, have been listened to by the Court. The refusal of the Court, therefore, to let proof of the partial failure of consideration come first, is not to be disturbed.

The second refusal to admit the evidence, is not to be disturbed. When this refusal was given, the state of the defendant, as respects to proof, had not changed. He had tried to prove the note not to have been transferred, until after it had become due; but he had failed to prove it.

The ground of the motion for a new trial, viz.: newly discovered evidence, was not sufficiently verified. In addition to the affidavit of the party himself, there should have been the affidavit of one, if not of both the Millers.

In distinguishing a motion resting on no better a foundation than this, we cannot see in what the Court erred.

Griffin vs. Stampfer and another.

No. 23.—JOHN B. GRIFFIN, plaintiff in error, vs. MARTIN J. STAMPER and another, defendants in error.

[1] A party deriving title under a forged bond; may by the instrument which, in order to avoid the disadvantage of being considered, in law, as holding under the obligor.
[2] A bond, though forged, on the part of the obliging officer, if executed, ~~and~~ helpless, as ~~on~~ side by the obligee and those signing under him, and without knowledge of the fraud, gives a color of title, under the Statute of Limitations.

Ejectment, in Talbot Superior Court. Tried before Judge Condraan, September Term, 1854.

The lot of land in dispute was granted, in 1828, to Daniel Zetler, who, in 1847, conveyed it to Martin J. Stampfer. The suit was brought on the original documents of Zetler and Stampfer, against John B. Griffin, tenant. The defendant relied on the Statute of Limitations, and proved, that in 1836, one Morris purchased the lot of a man calling himself Daniel Zetler—gave him note and took a bond for titles, to be executed 25th December, 1837. Morris afterwards transferred the bond to Bush, who went into possession. Several intermediate conveyances brought the title to Griffin, and possession had been had for more than seven years.

Defendant proposed to prove by one Neilligan, that he was acquainted with Zetler's hand writing, and that the signature to the bond was a forgery. Also, a deponent of his, showing him to be a different man from the one who gave him the bond for titles. The Court rejected the witness as irrelevant, and defendant disagreed.

W. W. Scott & Clark, for plaintiff in error.

G. M. Hart and J. Johnson, for defendant in error.

My old power.—Dissenting to certifying the opinion.

[3] ought the defendant to have been allowed to show that

and his daughter and another.

Whether defendant was a forged; or that it was made by defrauded citizens, approaching Zetler?

Upon this topic witness before this Court, (1st Mr. Ross, p. 639,) we held that the bond the ticket, purporting to be uncancelable by Zetler to Morris, 1855, which had been transferred, through several intermediate hands, to the Antislavery or those under their Master's control, could not be rejected on the score of forgery, as against Morris, because the purchase-money had been lawfully paid. And a trustee depository, so, making himself free from all claim, has no grounds to prove that Zetler never abandoned the South. But, notwithstanding, the claim, nothing so definite as that of the trustee depository, i.e., that those depositories were sufficiently suspicious of a forged stamp, to demand the withdrawal of the money held, openly, notoriously and shamelessly. He knew he had never conveyed it to anybody; that the person against whom he brought suit, was his Master, notoriously or otherwise. He was not oxidized, as to this particular. His knowledge heightened upon it in due time. Why did he sleep, during his master's absence, without night, without investigating anything? His conduct stamped the character of the defendant, positively, conclusively, beyond contradiction, established.

Why multiplying the contradictions in answer, is the best proof that his true opinion, when interrogating against the 1st Mr. Ross? M'orris acted thus false—if he believed that the obligor was Daniel Zetler, unless we are prepared to know the doctrine negligently relied by this Court, and every other in the Union, that a void grant, does it bind, may nevertheless be good as title of title, when the defendants in ejectment, claiming, as they do, under Morris, are entitled to be protected, notwithstanding this bond be a forgery. It was clearly admissible, to show the great notice with which Morris purchased, under whom the defendants in ejectment held. In other words, paradigmatical as it may appear to us, if it is plain that it was allowable to

Grillers, Shaffer and another.

the grantee had, set one purpose, and good, or supposed to be so, at least, by Morris, the vendor, for another, that, as owner of title, "to protect his possession." shall he give nothing inconsistent in the two propositions.

Whatever the doctrine is advanced, that a collateral's good to give color of title, under the Statute of Limitations, & then perceive I, or thought I did, something like a withholding of assent on the minds of some. I confess myself surprised at this. The rule has gone much further; and in *Gregg vs. Sayre*, (8 Peter's U. S. Rep. 244,) the Supreme Court of the United States held, and very properly, both upon principle and authority, that even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it; and when they received their deeds, had no knowledge of it, but accepted the same in good faith, the deeds, upon their face, purporting to convey a title in fee, and showing the nature and extent of the premises, the Court say there can be no doubt the deeds do give color of title, under the Statute of Limitations. See, also, 6 Cowen's R. 623.

And this is precisely the case at bar, in the second aspect taken of it.

And why, I ask, should this not be so? Suppose the deed be fatally defective, or even fraudulent, on the part of the grantor, and still the grantee, as owner, *bona fide* claiming, and believing himself to be such, should not possession, under such a title, be considered adverse? How can it be said that such a one holds in subordination to the legal owner?

Constitutional questions, etc.

John M. Dawson, &c. vs. The Central Bank.

No. 1. John M. Dawson, administrator, &c., plaintiff in error; vs. THE CENTRAL BANK OF GEORGIA, defendant in error. THE CENTRAL BANK, plaintiff in error, vs. J. M. DAWSON, administrator, &c.

[1.] The Act of 1847, "to amend discoveries at Common Law," makes express provision, that nothing in that Act contained, shall preclude any party from exhibiting his bill in Chancery, for discovery touching the bank matters.

[2.] Where a bill in Equity was filed, alleging that a bill of exchange drawn by H, with the names of R and E indorsed thereon, the name of the acceptor being left in blank, was handed to M, and an understanding was had that the Bill was to be accepted and then discounted for the benefit of R and E; and thereupon, M indorsed the same after R and E; but subsequently, the name of R was erased and removed from its position on the back of the bill, and inserted as acceptor; and this, as the bill alleged, ~~was done~~ with the consent and privity of the bank which discounted said bill, and was suing M on the same at Common Law: Held, that this was ~~quodlibet~~ of said instrument to the injury of M, by lessening the security which he had the right to suppose, when he indorsed the bill, was interposed between him and payee, and that the bank might be perpetually enjoined in the ~~disposition~~ in action against M, upon proof of these facts! Held, also, that upon the coming in of the answer by the bank, sweeping off the equity, thereby disavowing its privity with the transaction, that the ~~plaintiff~~ would be relieved, to await the hearing.

[3.] The Statute of Limitations does not run against debts due to the Central Bank, because the State is the owner of its assets, nor because it has transferred any portion of its sovereignty to the bank; but because it has made no provision by express legislation.

[4.] The Statute of 1790, which regulates the order in which debts due by a testator or intestate are to be paid, includes and refers to "debts due the public." Held, consequently, that a debt due the Central Bank is within the terms of this Statute, whether it be a debt due the public, or upon the footing of a debt due to a private person.

[5.] Demand, notice, protest, &c. are not necessary to charge an indorser in a suit against him, upon a note or bill due to the Central Bank.

[6.] A Court of Equity will not apply an equitable bar for the benefit of an indorser, on a bill of exchange due the Central Bank, because the application was brought upon the same in eleven years, and of the loss of his rights on prior parties to the bill by death or removal, where it does not appear that that indorser has taken any steps such as the law authorizes, or exercised any diligence to protect himself from the loss or lessening of the security of those who preceded him on the bill.

200 **DECISIONS OF THE COURTS OF GEORGIA.**

Macon, March, 20. A. D. 1854.

[7.] The general principle is correct, that where an injunction makes a few specific objects, and omits others, the defendant is entitled to sue for a dissolution of the injunction; After which the plaintiff presents no new case, and the equities remain the same.

In Equity, in Talbot Superior Court. Decisions by Judge CRAYTORD, at Seneca, April, 1854.

The Central Bank of Georgia brought suit against Jones M. Mahone, as administrator of Peter T. Mahone, as indorser, on the following draft:

MILLEDGEVILLE, April 3, 1854.
\$2500 b.

Four months after date, pay to the order of Whitnel Eason, at either of the banks in Augusta, Twenty-five Hundred Dollars, for value received, and charge the same to account of

WILLIAM S. HARP.

To SAMUEL ROWE, Augusta.

Accepted.

SAMUEL ROWE.

Indorsed.

Pay to Peter F. Mahone.

SAMUEL ROWE.

Pay Wilkins Hunt.

WHITNEL EAISON.

Pay Central Bank of Georgia.

P. F. MAHONE.

WILKINS HUNT.

There was a verdict for plaintiff, and an appeal. On the appeal, Mahone filed his bill in Equity, praying an injunction charging that this draft was really for the benefit of Whitnel Eason; that Mahone was a mere accommodation endorser and that at the time he indorsed, he did not know that the original indorser had not been credit; that the name of the original indorser was erased from the note, with the consent of the drawer, and that in 1841, the Central Bank bought out all the notes of

Mahone, adm'r, &c. vs. The Central Bank.

A plea of *non est factum*, on the ground above stated, was filed by Mahone, then in life, and that on the appeal, after the cause was submitted to the Jury, the presiding Judge having charged that the failure to protest and give notice to the indorsers discharged them, the Central Bank voluntarily submitted to a non-suit; that the fact was, that no such notice was given; and until the Supreme Court held otherwise, this was held, by the Superior Court, to be fatal to the claim of the bank; that the bank had been guilty of great *laches* in not suing the maker and prior indorsers; that since the present suit was brought the complainant had given the bank notice to sue the drawer and prior indorsers, which they had failed to do in three months. The bill farther charged, that at the time said suit was first brought, Eason's estate was not fully administered, and was abundantly able to pay said debt; that complainant, as administrator of P. F. Mahone, had never received any notice of this debt, and had fully administered and distributed the estate, except about \$780, still in his hands. The distributees of the estate were made parties defendant, and a prayer was made, that if paid at all, they should be decreed to pay it according to the amount received by them.

The bill prayed a perpetual injunction against the bank, of the suit progressing on the draft: and discovery and relief.

The answer of the bank was made in the name of the Central Bank, and was sworn to by the treasurer and *ex officio* director, in the following form:

GEORGIA—BALDWIN COUNTY:

Personally appeared before me, John B. Trippe, Treasurer and Director of the Central Bank, who being sworn, says—"that the answer in the foregoing pages, so far as they rest in his own knowledge, are true; and so far as he derives them from information, he believes them to be true."

Complainant's Counsel moved to take the answer off the file.

Mahone, adm'r, &c. vs. The Central Bank.

- 1st. Because it was not made under the seal of the bank.
- 2d. The affidavit was not in compliance with the 11th rule for Equity Practice.
- 3d. Because it was not signed by Counsel.
- 4th. Because the treasurer was not authorized to make answer for the bank.

The Court over-ruled the motion, and this is assigned as error.

The answer stated that the bank was ignorant of the circumstances under which P. F. Mahone indorsed the draft, but denied all knowledge or belief that Rowe's name was indorsed thereon, when Mahone signed his, or that it was stricken out without his knowledge or consent. The answer denied that the name of Rowe was stricken out with the knowledge and assent of the bank, or while the bank was owner of the bill. It admitted the suit in 1841, and that the case progressed and terminated in a *non-suit*. It admitted the notice to sue, and that the bank had not sued, because the parties were either removed from the State or dead, and their estates unrepresented when the notice was given. It admitted that notice was not given to the administrator of Mahone, of the claim against the estate.

Complainant's Counsel excepted to this answer as insufficient—

- 1st. As to the erasure of the name of Samuel Rowe.
- 2d. As to the allegation, that the estate of Eason was sufficient to pay said debt, if the bank had prosecuted it.
- 3d. As to the suit in 1841, and its abandonment by the bank.

4th. As to the complainant's giving notice to creditors, and distributing the estate before notice of this claim.

The Court over-ruled the exceptions, and this is assigned as error.

Defendant's Counsel then moved the Court to dissolve the injunction, on the ground that the equity was sworn off by the answer. The Court sustained the motion, and this decision is assigned as error.

Mahone, adm'r, &c. vs. The Central Bank. •

Defendant's Counsel also moved to dismiss the bill for want of equity. This motion was refused, and the Central Bank assigned this decision as error. The two writs of error were consolidated in the Supreme Court, and heard together.

JAS. JOHNSON, for the Central Bank.

B. HILL and S. JONES, for Mahone.

By the Court.—STARNS, J. delivering the opinion.

[1.] This bill asks the interposition of a Court of Equity, for purposes of discovery; and it is insisted before us, that such discovery, by answer in Chancery, is not needed and should not be granted, because, by the Act of 1847, the defendant might have taken the answers of the bank or its officer, in the Common Law case, by interrogatories.

The Act of 1847 mentioned, makes express provision that nothing in that Act contained "shall preclude any party from exhibiting his bill in Chancery, for discovery, touching the same matters." So that the complainant's right to a discovery in Equity, is in no wise lessened by the Act of 1847.

[2.] The chief relief peculiar to a Court of Equity, which is sought by this bill, is the grant of perpetual injunction.

For the defendant in that Bill (the Central Bank) it is said—

1. That the defendant has an ample remedy, by defending the Common Law action against him, admitting that the case he makes in his bill is true, and that an injunction is not needed; that he does not pray to have the paper sued on delivered up to be cancelled, &c.

Waiving a consideration of the rule, that where a Court of Equity takes jurisdiction for discovery, it will entertain it for relief, we remark, that though it be true that the complainant might defend himself successfully against the Common Law action now pending against him, yet, under the circumstances set forth, this remedy cannot be said to be adequate and complete. There is nothing to prevent a dismissal of the petition,

• Mahone, adm'r, &c. vs. The Central Bank.

if the views of the Court should be against the bank, as was done when action was brought upon the same instrument against complainant's intestate, and a renewal of it after the lapse of years. And from this the complainant, who is acting in the premises simply as a trustee, can be and ought to be protected, if the allegations of the bill be true, by a perpetual injunction, which will be precisely equivalent, in its effects, to a cancellation of the instrument, as to him.

It seems not to be denied, that if the draft has undergone an alteration or change, in fraud of the rights of complainant's intestate, a Court of Equity might decree that it should be delivered up to be cancelled. But it may be doubted whether or not that would be the proper course to be pursued with this instrument. Other parties to it are liable thereon to the bank, and have no such defence as that of the complainant. The better prayer for relief would seem to be, therefore, that which is preferred; and it amounts, in effect, to a prayer for cancellation, *quoad* the interests of the complainant's intestate in the instrument.

2. It is contended that sufficient foundation for such injunction has not been laid in the allegations of the bill. It is argued that the bill sets forth an erasure of the name of Samuel Rowe, as indorser, after the indorsement by Peter F. Mahone, but does not show that any injury resulted thereby to the latter, because it appears that the name of Rowe was transferred from the back of the paper, "as indorser, to its face, as acceptor; and thus, the security of his property and credit was still interposed between Mahone and payment of the bill."

We are inclined, strongly, to think that when a bill of exchange is drawn by a person, the name of the acceptor being left in blank, and the same is handed to a third party, with an indorser upon it, and that third party is requested, as a matter of mere accommodation, to put his name after the indorser whose name is upon it, and does so, with the understanding that it is to be discounted in some bank, for the accommodation of the drawer and indorser, the legal intentment of such a transaction is, that the blank is to be filled by another per-

Mahone, adm'r, &c. vs. The Central Bank.

son as acceptor, and that when the paper is completed, there will be between the last indorser and payment, two persons interposed.

We think, at all events, that this bill, though not very skilfully framed, with reference to this allegation, when its whole structure is considered, sufficiently sets forth the fact, that such was the understanding of the indorser, Mahone, in this case; and that the erasure of the name of Rowe as a prior indorser, and the insertion thereof as acceptor, removed one of the securities, which he had the right to suppose when he indorsed the bill, would intervene between him and payment by him, and was in fraud of his rights.

The bill also alleges, in effect, that to such change the bank, though receiving such bill as a negotiable paper before it was due, was privy and consenting. If this be so, Mahone had the right to plead, when sued upon this instrument by the bank, *non haec in foedera veni*, and his administrator is entitled to be protected against the suit upon the bill.

But an answer has been filed—the bank, by its officer, denies that it had anything, whatever, to do with this alteration in the bill, if it were made, and thus swearing off the equity of the bill, the injunction, so far as this point is concerned, has been properly dissolved, to await the hearing.

[3.] Another ground on which the Chancellor has been asked by the complainant, in this bill, to interpose by injunction is, that the action on this bill of exchange, is barred by the Statute of Limitations. And to sustain this position, it is argued, that the doctrine of *nullum tempus occurrit reipublicae* does not apply to debts due the Central Bank. This argument has been rested, first, upon the ground, that the phraseology of the latter part of the 11th section of the Act of 1829, amending the charter of the Central Bank, shows that the Legislature intended, by that Act, to vest in the corporation "the rights, powers, privileges or immunities reserved by law, or accruing to it, in virtue of its sovereign capacity, in regard to the collection of the bonds, notes, specialties, &c. due to it or to become due," only so far as the "bonds, notes, special-

Mahone, adm'r, &c. v. The Central Bank.

ties, judgments," &c. originally transferred to the bank, or the bonds, notes, &c. in renewal of them were concerned; and did not design to vest these privileges in the corporation, in regard to the collection of any other bonds, notes, &c. For, says the Counsel, the latter words of the section show that these privileges, immunities, &c. are vested "in as full, perfect, absolute and unqualified a manner, as they could have been used, enjoyed and exercised by the State, *had no such transfer been made, or such bank been established.*" And now, says the ingenious Counsel, notes, bills, &c. discounted from time to time by the bank, and not part of the assets transferred to the bank, by the State, or in renewal thereof, in the nature of things, could not have existence in as full and perfect a manner, &c. *as though such bank had never been established;* and the immunities claimed, being such as applied to instruments which could be contemplated as existing, and having those immunities attached as one of their incidents in as full and perfect a manner as if such bank had never been established, *ergo,* such a bill as that at bar not having been transferred to the bank by the State, nor given in renewal of one thus transferred, does not fall within the description of those instruments to which these immunities attach.

But the argument proves too much for the case. For if the language specified will not apply to a note or bill having the relation to the bank which this has, no more will it apply to notes given in renewal of those originally transferred; for these renewal notes cannot be considered as ever having existed in as full, perfect and unqualified a manner as if such transfer had never been made, or *such bank been established.* Such renewal notes, indeed, cannot be thought of at all, except in connection with the existence of the bank. But the Statute applies to such renewal notes, in plain terms, and this the Counsel admits. The argument, therefore, is unsound. The physiognomy criticised, is not altogether accurate, but in the opinion of the Court, the provisions of this section were intended to apply alike to all evidences of debt owned by the bank.

In the next place, it was alleged that the Central Bank was

Mahone, adm'r, &c. vs. The Central Bank.

not authorized, by law, to avail itself of the doctrine of *nullum tempus, &c.* because this was an assertion of a sovereign prerogative, and the State cannot transfer or delegate its sovereignty.

We have no intention of discussing the right of a State to delegate its sovereignty, a question so much and so loosely talked about, and perhaps so little understood; for we have no idea that this case rests upon a solution of it.

We do not put the right of the Central Bank, to have the debts due to it exempt from the operation of the Statute of Limitations, upon the ground, that the State has transferred to it any portion of its sovereignty. We look upon the twelfth section of the Act of 1829; as containing in the provision, that "in directing, by the second section of the Act establishing the bank, the transfer to it of all the bonds, notes, &c. due to the State, the General Assembly did not divest the State of any of its rights, powers, privileges or immunities, reserved by law, or accruing to it in virtue of its sovereign capacity, in regard to the collection of the aforesaid bonds, &c. further than to vest the said rights, &c. in the said president and directors;" that which is equivalent simply to a legislative declaration, that the State had authorized the bank to avail itself of the doctrine of *nullum tempus, &c.*

It will be observed, that these privileges, &c. thus vested in the bank, are privileges *in regard to the collection* of debts due. What other immunity than its right to avail itself of the principle of *nullum tempus* could there be, "in regard to the collection" of these debts? The immunity of not being sued, could not have been meant; for the State could not be sued for a debt due to it; nor could it have been intended that the bank should not be subject to any cross action, or off-set, where it had sued for the collection of a debt, for to such the State would be subject where it had already entered the jurisdiction of the Courts.

This view removes all difficulty growing out of the idea, that the State cannot delegate its sovereignty. This consideration, too, obviates any difficulty which might present itself in the

Mahone, adm'r, &c. vs. The Central Bank.

shape of an objection, that if these immunities were transferred to the bank, to be exercised as a portion of the sovereign prerogative of the State, and the bank is thus clothed with these attributes of sovereignty, its bills are or were in the nature of "bills of credit," and its organization is contrary to the Constitution of the United States.

According to this view, the bank, instead of possessing the attributes of sovereignty, has no more power than is given to it in the Act of incorporation, and precisely the same as if the stock were owned by private individuals. In which case, according to the Supreme Court of the United States, it is constitutional. *Briscōe vs. The Bank of Kentucky*, (11 Pet. 257.) And in this view, and on this account, its right to avail itself of the principle of *nullum tempus*, is not obnoxious to the objection suggested by the Supreme Court of Alabama, in the case of *Bank of Alabama vs. Gibson's Adm're.* (6 Alq. 814.)

There the right of a bank to this immunity, was put upon the ground that the State was the sole owner of the stock, and it was argued, that therefore, the State's sovereignty was transferred to the bank. Here, it is placed upon the basis of an express legislative provision, in the Act of incorporation, which, in effect, declares that time shall not run against the bank.

On this subject, one of the Court (our brother BENNING) desires us to say, that he *distrustingly* yields his opinion to the conclusion, that taking the whole of its legislation together, the State *has vested* the right in the Central Bank, to avail itself of this privilege; finding, as he does, certain features of that legislation, (especially the provision which authorizes the bank to sue and be sued,) which create some doubt in his mind. But that member of the Court has no difficulty as to the power of the Legislature to enact, that the Statute of Limitations shall not run against the Central Bank; or arising out of the suggestion, that the bank can assert this privilege only by virtue of delegated sovereignty. He has only hesitated in saying that it *has done it.*

Our construction of this section then, is, that it is equivalent

Mahone, adm'r, &c. vs. The Central Bank.

to a legislative provision, that "in regard to the extinction" of its debts, the Statutes of Limitations, in the State, shall not operate against the Central Bank.

[4.] We are next asked to decide, whether or not this endorser was discharged by failure of demand and notice, protest, &c. on the part of the bank?

We cannot agree with the Counsel for the complainant in this bill, and give to the 26th section of the charter, dispensing with notice, &c. the limited signification which he ascribes to it. We look upon this point as settled by the decisions of this Court, in *The Merchant's Bank of Macon vs. The Central Bank*, (1 Kelly, 431;) and *The Central Bank vs. Whitfield*; (*Ibid.* 598;) and we are disposed to apply the maxim *stare decisis*, and to hold that such demand, notice, &c. were not necessary in this case.

[5.] Another and a very important point, is made by this Bill, to the effect, that no notice of this debt was given to the administrator of Peter F. Mahone, until more than twelve months had elapsed from the grant of letters, and until he had distributed all of said estate, except the sum of \$781.84, and that as a consequence, he is relieved from all liability, personally, for more than the sum just specified.

To this it was objected, that here again the doctrine of *nullum tempus applies*, this being a debt due the State.

It has been held, that a debt due to a banking corporation, although the State owns the whole interest of the bank, is not a debt due to the public. (*The Bank of South Carolina vs. Gabbe*, 3 McC. 877. *Briscoe vs. The Bank of Kentucky*; 11 Pet. 251.)

But it is unnecessary for us, now, to pronounce our opinion upon this point. If this debt is not a debt due to the public, it is of course included among the general provisions of the Act of 1792. If it be a debt, due to the public, then, by express provision, the Legislature has excluded it among those which are to be rendered to the administrator within twelve months according to the Act of 1792.

Mahone, et al., vs. The Central Bank.

That Act, which regulates the order in which the debts due by a testator or intestate are to be paid, and which includes the aforesaid exemption, refers to "debts due the public," among others. And then, in the same context and paragraph declares, that "creditors neglecting to give in a state of their debts within the time aforesaid, the executors or administrators shall not be liable to make good the same," &c. It follows that the word creditors here applies to all those creditors to whose debts reference had been just made, and of course, the public or State among the rest.

It results, that a judgment *quando acciderit* only, must be taken against this administrator, (if the bank be, on other grounds, entitled to recover,) except as to the sum now in his hands.

[6.] We are of the opinion that the circumstances do not authorize the application of an equitable bar to this demand, in favor of the complainant, on account of lapse of time; "and from loss of his rights on prior parties," as his Counsel expresses it.

As inteseter, his intestate might have taken such steps as the law authorizes, to have secured himself against the loss or lessening of his security, by death or removal of those who preceded him in responsibility, on this paper. It does not appear that he has done so. And in the absence of anything to show this, we hardly think the complainant can be protected, on the ground of *laches* or *paramount equity* suggested.

[7.] It was also insisted by the complainant, that the amendment filed in this case, *per se*, made a new case in Equity; and until it was answered, the defendant was not in order to move a dissolution of the injunction.

This general principle is correct enough. But here, so far as the defendant's rights are concerned, the amendment presents no new case, and the claims of the bill remain the same. Hence, the rule *stricti causae* cannot be held to have any application to the case before us.

The motion to take the answer off the file, and the transmission to

Court of Ordinary, for the use of,

the sufficiency of that answer, were all, in our opinion, rightly overruled by the Court below, whose judgment we affirm.

No. 25.—WILLIAM C. OSBORN, plaintiff in error, vs. THE OR-
DINARY OF HARRIS COUNTY, for the use of Robert E. Huey
and others, defendants in error.

- [1.] In reference to partitions, the establishment of lost papers, the foreclo-
sure of mortgages and the settlement of accounts and such like matters, the
settled doctrine now is, that notwithstanding, by the English law, Chancery
may have had concurrent and even exclusive jurisdiction, still, if a full and
complete remedy has been provided here by Statute, Equity is ousted of its
jurisdiction, unless a special case is made by the bill.
- [2.] By the laws of this State, ample provision is made for actions at Law, on
guardians, administrators and other trustee bonds; and to that forum par-
ties must resort, unless they make a special case by the bill.
- [3.] A resort to Equity is unnecessary to adjust the relative rights of trustees
to a trustee bond, as by the Act of 1826 the trustees are allowed to come in
at the trial and make special defence, and have their respective responsibili-
ties ascertained and established.

In Equity, in Harris Superior Court. Decision on demurrer
by Judge CRAWFORD, September Term, 1854.

This bill was filed by the wards of Alexander S. Huey, their
former guardian and his sureties, (William C. Osborn and an-
other) on his bond as guardian, praying an account, and alleg-
ing a breach of his bond in his failure to account.

The bill charged that Alexander S. Huey had removed from
the State of Georgia and lived in Arkansas; that he was pur-
tely insolvent, having wasted and converted to his own use all
of their property; that before he left Georgia, he placed in
the hands of each of his said sureties assets to an amount large
enough to indemnify them from all loss, by reason of their sure-

Osborn vs. Ordinary, for use of, &c.

Cy. The bill prayed specific discovery from the sureties of the nature and amount of these assets, alleging inability to prove them otherwise.

To this bill William C. Osborn filed a general demurser, which being over-ruled by the Court, he excepted and assigns error thereon.

WELBORN & CLARK, for plaintiff in error.

INGRAN & DUMSEY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

According to the case made by the bill, had the complainants a complete remedy at Law?

[1.] The rule now well settled in this State is, that in reference to partitions, the establishment of lost papers, the foreclosure of mortgages, the settlement of accounts, &c. that notwithstanding, by the English law, as adopted here, Chancery may have had concurrent or even exclusive jurisdiction over these or any other subject, still, if full redress has been provided by Statute, Equity, in that case, is ousted of its jurisdiction, unless a special case is made by the bill.

[2.] Now it is not denied, but that by the laws of this State, full provision is made for suits at law, on guardian's, administrator's and other trustee bonds. To this forum, then, these parties must resort, unless they have brought themselves within the exception just stated. Have they done so? We have searched in vain for any statement to this effect.

The non-residence of the guardian does not confer jurisdiction. So far as the question of jurisdiction is concerned, the residence or non-residence of the principal is wholly immaterial. What special case, then, is made by the bill? It is not suggested that there is any complication in the accounts of the guardian, which cannot be adjusted at Law. No discovery, even, is sought of the non-resident guardian, who *pro forma* is made a party, and upon whom service is prayed to be perfect-

Osborn &c. Ordinary, for use of, &c.

ed by publication. Neither is any appeal made to the consciences of the securities to make disclosures.

It is true that the bill alleges that the principal, when about to leave the State, placed in the hands of his securities some five thousand dollars, in money or property, "to indemnify and save them harmless." But the bill does not seek even to pursue this as a *trust fund*, set apart by the guardian for the discharge of his liability, nor is there any intimation that the securities are insolvent or any thing of that sort.

[3.] The only thing which seems to have been in the eye of the draftsman of the bill, which needed the aid of a Court of Equity, was the fact that this fund had been placed in the hands of the securities—the complainant not knowing the relative amount or portion received by each. Hence he asks for information upon that point, and insists, in the argument, that Equity, abhorring a multiplicity of suits, will entertain this bill, especially for the purpose of adjusting the rights of the several securities.

What has the complainant to do with this? who constituted him the *next friend* of the securities? The favor which he tenders is not only not solicited, but respectfully declined. And, in our judgment, no Court has the right to thrust this upon the sureties *nolens volens*, willing or unwilling. They know best—how best—to protect themselves. Were it otherwise, and did this constitute a sufficient ground for the interposition of a Court of Equity, we are again met by the Act of 1826, which allows securities to come in and make special defence at the trial, and have a special verdict entered up, fixing their respective rights and responsibilities.

If one of the securities had received from their common principal funds to protect him against the whole or any part of his liability, that surely became a principal as to his co-sureties, *pro tanto*. And so, the verdict and judgment, under the Statute of 1826, would find and establish. And another surety paying the debt to the creditor, would be entitled to control the *si. fa.* to re-imburse himself accordingly.

Walker et al. vs. Cook.

So then the last plank upon which this bill could stand, is knocked from under it.

No. 26.—T. O. WALKER et al. plaintiffs in error, vs. EDUARDO COOK, defendant in error.

[1.] By the Statute of 1854, the Courts are required to receive a material amendment, "at any stage of the cause." Where a demurrer to a bill is over-ruled and the bill sustained, the decision taken up by writ of error, and the judgment reversed: *Held*, that where the case is remitted generally, it is in "a stage of the cause" until the action of the Court below thereon, and is in order to be amended.

In Equity, In Harris Superior Court. Decision by Judge CRAWFORD, September Term, 1854.

This bill was filed by the plaintiffs in error, against the defendant in error, for the recovery of certain negroes and other property, under a marriage contract. A general demurrer, by defendant, being over-ruled, that decision was excepted to and carried to the Supreme Court. At Americus Term, 1854, the Court reversed that decision. (See the case reported in 15 Ga. R. .) At the next term of Harris Court, complainants moved to amend their bill, by alleging a mistake in the draftsmen, and praying a reformation of the contract. Defendant's Counsel moved to make the judgment of the Supreme Court the judgment of the Superior Court, and a dismissal of the bill. The Court allowed the latter and refused the motion of complainants, to amend, on the ground that there was nothing to amend by. This decision is assigned as error.

The Court also granted an order directing the receiver, in this case, to deliver to Cook all of the property and the profits thereof. This decision is also assigned as error.

Walker et al. vs. Cook.

Judge BENNING having been of Counsel in this case, did not preside.

DUGHERTY & INGRAM, for plaintiff in error.

S. JONES, for defendant in error.

By the Court.—STARNS, J. delivering the opinion.

An inspection of the record satisfies us, that (as we suggested when this case was argued before us,) the Court below placed the judgment, there, solely upon the ground, that as this Court had decided, when the cause was before us at Americus, that "the demurrer should have been allowed, and the bill dismissed" (to use the language of his Honor Judge CRAWFORD) "there was nothing by which to amend; and to allow the amendment, would be the same as granting leave to file a new bill."

This being the language of this record, it certifies to us that the Court below did not consider and decide upon the sufficiency of the amendment offered. We prefer not to do so until full opportunity, both in the Court below and in this Court, is afforded for the discussion and consideration of the same. We shall therefore confine this judgment to the question, as to whether or not the Court was right in holding, that after the decision of this Court, reversing the judgment upon the demurrer, there was nothing in the Court below "by which to amend."

1. Let us examine this matter, first, upon common principles of Chancery practice. It will be found, by looking to our records, that our judgment simply reversed the judgment of the Court below sustaining the bill. That judgment was a decision over-ruled the demurrer, on the ground that there was equity in the bill. Our opinion was, that this should not have been done, because there was no equity in the bill. But as the bill had been sustained, and the case kept open the records

Walker et al. vs. Gobin.

of the Court below, and the revising Court had not ordered it to be dismissed; when the judgment of the latter Court went below, did it not place the case before the Chancellor there, as a case still in Court, but in which the law, by its supreme exponent, had said there was no equity? Was not the Chancellor, thus left to deal with it according to Law, and to that discretion which a chancellor has in the premises, and thus placed precisely where he would have been, if he had been of the opinion when first hearing the demurrer, that there was no equity in the bill? In such event, he might have dismissed the same; or if a legal amendment was offered, supplying the want of equity, he might have received it with or without terms, as to costs. This view derives support from the consideration, that it is the duty of a Chancellor to retain a bill, and not drive the parties out of Court, if this can be justly done. This Court has so repeatedly decided. And we and other Courts have gone so far as to say, that it is sometimes the duty of a Chancellor to direct an amendment, (even where it is not formally moved,) rather than turn the parties out of Court. *Wade vs. Parker,* (2 Keene, 590.) *Roberts and Wife vs. West,* (15 Ga. 123.) In this view of the matter, it follows, that in the discharge of his duty, and exercise of his discretion as Chancellor, the Court below, upon the argument of the demurrer, might not have dismissed the bill, though he had decided, as we have said he should have decided, that there was no equity in the bill; but he might have allowed or directed an amendment.

There was, consequently, a plain propriety in putting the case again before him, so that he might thus exercise his duty in the premises.

2. But if this view be not correct on general principles, (and perhaps some contrariety of opinion on this subject has prevailed,) it is sustained and required by the Act of our last General Assembly, allowing Amendments to be received at any stage of a cause.

We have said enough to show that the bill was not dismissed until the amendment was presented in the Court below.

Walker et al. vs. Cook.

anything more be needed, the proceeding there, of the defendant, shows this plainly enough. For when the co-complainant's Counsel moved his amendment, defendant's Counsel objected, and insisted that they were entitled, first, to move in the case; and they accordingly urged a right, first, to be heard therein, "when the case was called in its order." Thus, by the admission of the Counsel, the case was *there* in the Court, to be "called in its order;" and if this were so, it was in some stage thereof. It may have been their opinion, that it should have been considered in its last stage, but they treated it (and properly, as we have shown) as in a stage of existence.

If, then, it were there in any stage of its proceeding, the Act of our last Legislature, which must be the law to us all, interposed and declared, when, this amendment was offered, that it should be allowed "as matter of right".

The amendment offered must be, of course, a legal amendment—such an one as is admissible in such a case. Whether the amendment here tendered, is so or not, we do not decide; but leave this to be determined in the proper way; in the Court below...

As a sort of counter-guard against that encouragement to negligence which this free and unrestricted permission to amend might be supposed to extend upto parties and Counsel, this Statute provides, that if the party applying shall have been guilty of negligence, &c. the Court may compel him to pay his adversary the costs, and put him upon other reasonable and equitable terms, not touching the real interests of the cause. True, that the Chancellor might have done this previously in such a case, but the custom has grown very much into disuse in our State, I believe. Courts, now, in administering this Statute, will probably feel the strong policy and propriety of enforcing this practice.

The judgment is therefore reversed, on the ground that the Court below erred in deciding that the bill could not be amended; it being the opinion of this Court, that the amendment should have been received, if upon consideration thereof the

Hester vs. The State.

Chancellor had believed that it was a legal and proper amendment in such a cause; subject, of course, to his right, in his discretion, to prescribe terms as to costs.

No. 27.—JAMES L. HESTER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] [2.] [3.] An indictment which states the offence in the language of the Code is sufficient.

[4.] On the trial of an indictment the panel is put upon the accused. Afterwards, he is arraigned and pleads not guilty. Then the panel is again put upon him: Held, that there is no error in this.

[5.] On the trial of an indictment for arson, a witness swore as follows: "witness believes this was defendant's track, because he has been a good deal with defendant; has noticed his track and never saw any body else that made a track exactly like defendant does. Defendant's toes turn out in walking more than any person's he ever saw. The track witness followed turned out like prisoner's, and was about the same size": Held, that this was legal evidence.

[6.] Imprisonment in the penitentiary for three years, is not too great a punishment for the burning, by night, of an out-house not in a city, town or village.

Arson, in Taylor Superior Court. Tried before CRAWFORD, Oct. Term, 1854.

The errors assigned are the refusal of a motion in arrest of judgment, and a motion for a new trial.

The indictment alleged that the defendant did "burn an out-house, being then and there a corn crib, on the plantation of Bo F.—the said corn crib not then and there being in a town or village—by setting fire to the same." Motion in arrest—

1st. Because it did not allege that the house was consumed.

2d. Because it did not allege that it was in the day time or at night.

Hester vs. The State..

3d. Because it did not allege that the out-house was not a dwelling house.

The motion for a new trial was on the grounds, 1st. That the Solicitor arraigned the prisoner after a panel of 48 Jurors had been called and put upon him; and after the arraignment the Court allowed the panel to be put upon the prisoner again.

2d. That the Court erred in allowing two witnesses to give their opinion, that certain foot prints were those of prisoner—they having given their reasons for the opinion.

3d. Because the verdict was contrary to the weight of evidence.

The evidence was briefly as follows:

The corn crib was burned about 3 o'clock in the morning. It was not contiguous to any house, and was evidently set on fire. The owner of the crib was an acting bailiff; and had, the day before the burning, as bailiff, sold the corn of prisoner under a *j. & g.* Prisoner said that day to prosecutor, that if he sold his corn he should pay for it, and suffer for it. Threats of a similar character were proved by several witnesses. Foot prints, going to and from the burned house, through ploughed ground, were proven to be similar to prisoner's, who had a peculiar walk—turning out the toes more than with men usually. Confessions of prisoner, that he burned the house at the instance of one Dukes were also in evidence. He was drinking at the time, though not drunk. There was an attempt made to impeach the two witnesses who proved these confessions. Dukes was introduced by prisoner, and disclaimed all knowledge of it. Prisoner also attempted to prove an *alibi*.

The refusal to arrest the judgment and grant a new trial are assigned as error.

The Court sentenced the prisoner to imprisonment in the penitentiary for three years. This sentence is also assigned as error.

S. HALL and G. R. Hunter, for plaintiff in error.

DAMSHY and B. HILL, for defendant in error.

Hester vs. The State.

By the Court.—BENNING, J. delivering the opinion.

Should the motion to arrest the judgment have been sustained?

The first ground on which the motion was put, was that the indictment did not allege the house to have been *consumed*. What the indictment alleged was, that the accused "did" "burn" the house.

To burn has for its first and leading meaning, in Webster's Dictionary, "to consume with fire."

The word is commonly used, too, in that sense.

It is to be presumed, therefore, that it was so used in the indictment.

[1.] At all events, it is the word used in the definition of the offence of arson, and that justifies the use of it in the indictment. "Arson is the malicious and wilful burning of the house or outhouse of another." (Code. Cobb's *Dig.* 789.) "Every indictment or accusation of the Grand Jury, shall be deemed sufficiently technical and correct, which states the offence in the terms and language of the Code, or so plainly that the nature of the offence charged may be easily understood by the Jury." (Code, 1 sec. 14 *dig.* Cobb's *Dig.* 833.)

The second ground on which the motion was put, was the omission from the indictment of any allegation, to show whether the arson charged was arson in the day-time, or arson in the night.

The distinction between these two sorts of arson is confined, by the Code, to punishment—the degree of punishment. The definition of arson, as given above, is silent as to any such distinction.

[2.] The indictment "states the offence in the terms and language of" the definition.

The third ground on which the motion was put, was the omission, from the indictment, of an allegation, that the house burned was not a *dwelling house*.

The indictment did have in it an allegation, that the house

Buster vs. The State.

Raised was an out-house and a corn crib. And this is equivalent to an allegation, that the house was not a dwelling house.

[3.] Besides, the exception ("except the dwelling house") which the motion insists should have been negatived in the indictment, is not contained in the section defining the offence, but in a subsequent section, designating the punishment for the offence. *Elkins vs. The State*, (13 Ga. R. 439. 1 sec. 14. div. Code.)

These were all the grounds of the motion to arrest the judgment; and none of them being sufficient, the Court was right in overruling that motion.

Ought a new trial to have been granted?

[4.] There is, plainly, nothing in the first ground assigned in the motion, for a new trial.

In the second ground there is something, but not enough, as we think, to support the motion. This conclusion, however, is one at which we arrive not without difficulty.

That the opinions of a witness are not admissible in evidence, is, as a general proposition, undoubtedly true: yet, that to this proposition are many exceptions, is no less true. The general law on the question of the admissibility of this sort of evidence, is stated by *Greenleaf*, in his work on Evidence, thus: "And though the opinions of witnesses are, in general, not evidence; yet, on certain subjects, some classes of witnesses may deliver their opinions, and on certain other subjects, any competent witness may express his *opinion or belief*, and on any subject to which a witness may testify, if he has any recollection at all of the fact, he may express it as it lies in his memory, of which the jury will judge. Thus, it is the constant practice to receive in evidence any witness's belief of the identity of a person, or that the hand-writing in question is or is not the hand-writing of a particular individual, provided he has *any knowledge* of the person or hand-writing; and if he testifies falsely, as to his belief, he may be convicted of perjury." And he gives other instances. (1*Greenleaf's Ev.* §440.)

The opinions of the two witnesses which were received in this case, were opinions on a question of personal identity—on

Hester vs. The State.

the question, who was the person that had made certain footprints or "tracks," found in a field near the site of the burnt house. The bill of exceptions thus gives the testimony, on this point, of one of those witnesses: "Witness believes this was defendant's track, because he has been a good deal with defendant—has noticed his track; and never saw any body else that made a track exactly like defendant does. Defendant's toes turn out, in walking more than any person's he ever saw. The track witness followed turned out like prisoner's, and was about the same size."

In this statement, the witness gives his belief, and his reasons for that belief, which is more than a witness is required to do, to render his opinion, as to hand-writing, admissible; for to render a witness's opinion admissible, as to hand-writing, it is only necessary that he should be acquainted with the hand-writing of the person who, in the particular case, is assumed to be, or to be not the author of the writing in such case in question.

Whose hand made these marks—these letters on this paper? A. B.'s, I believe, (says the witness,) and I am well acquainted with the marks—the letters A. B.'s hand makes upon paper. I have seen him make such, his marks, often. This is good, as evidence.

Whose feet made these marks—these tracks in the sand? A. B.'s, I believe, (says the witness,) and I am well acquainted with the marks—the tracks which A. B.'s feet make in the sand. I have seen him make thousands of such. Why is not this also good as evidence? What reason is there that would condemn this, which would not equally condemn that?

Suppose that a hat—a handkerchief—nay, one of the very shoes which made the tracks in question, in this case, had been picked up near the site of the burnt crib, might a witness have been asked his opinion as to whose was the hat, the handkerchief, the shoe—his opinion as to whether they were the hat, the handkerchief, the shoe of the accused—the witness a person well acquainted with the accused, and a person having, as a reason for his opinion, that he had frequently seen the said

Hester *vs.* The State.

could wear such a hat, such a handkerchief, such a shoe? Might a witness be asked if, in his opinion, the man whom he saw at a distance, dimly in the obscurity, fleeing from the scene of conflagration, was the accused? Might a witness be asked this, on condition that he gave his reasons for his opinion?

If a witness might give his opinion in a case of this sort, and we think he might, he may equally give his opinion in such a case as the present.

What degree of credit is due to a witness's opinion, if given in such a case, is another question.

[5.] Upon the whole, therefore, we cannot say that we think this second ground to have been such as would have justified the granting of the new trial.

The Court below sentenced the accused to imprisonment in the penitentiary for three years. This sentence is assigned for error.

Section six of the fifth division of the Penal Code, is in these words: "The wilful and malicious burning of an out-house of another, such as a barn, stable or any other house, (except the dwelling house,) on a farm, or plantation, or elsewhere, (not in a city, town or village,) shall be punished by imprisonment and labor in the penitentiary, for any term not less than two years, nor more than seven years."

Section ten of the same division is in these words; "Arson in the day-time, (except in a city, town or village,) shall be punished by a shorter period of imprisonment and labor than arson committed in the night."

What we understand by these two sections is this: the punishment for the burning of an out-house not being in a city, town or village, shall be imprisonment and labor in the penitentiary, for a term which may be as much as seven years, and which must be as much as two years, provided the burning be done in the night; but if the burning be done in the day, then the punishment shall be imprisonment and labor in the penitentiary, for a term which must be not as much as seven years, and which may be not as much as two years.

The Court below has shown this to be a species of burning in

Branan vs. May.

the night. As far, therefore, as the case is concerned, it is perfectly clear that the imprisonment imposed by the Court, was for a term not too great.

So we see no error in the sentence.

Nothing else is assigned for error. Therefore, there ought to be a general affirmation of the decisions of the Court below.

No. 28.—JOSEPH BRANAN, plaintiff in error, *vs.* PLEASANT J. MAY, defendant in error.

[1.] To maintain an action for an injury received from an obstruction in a highway, two things must concur: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff.

Case, in Taylor Superior Court. Tried before Judge CRAWFORD, October Term, 1854.

This was an action by May against Branan, for the value of two mules, alleged to have been drowned by reason of defendant's digging a mill-race across the public highway, without authority of law.

The Court below admitted evidence of the use of the road as a public highway. Defendants excepted, insisting that there was higher evidence—the order of the Inferior Court. This is the first error assigned.

It appeared that May was travelling in a carriage with two mules, and a negro boy as driver. When the mules came to the bridge across the race, they stopped. The negro boy got down and examined the bridge, and reported that there were some holes in it. May then ordered the boy to drive up the race, to the left of the bridge. The mule again refused to go on. May ordered the boy again to examine, and when finding

Hansen vs. May.

the water to be only " ankle deep," he reflected that there was no objection in law to a deeper water. The water was deeper than reported. The tongue of the carriage struck into the opposite bank; the horses starting pulled the mules' heads under the water and they were drowned. This was a little out of the old road where the race crossed it.

The question was, whether, under these facts, the plaintiff exercised ordinary diligence to avoid the plaintiff's fall. The Court below held that he had, and this is the controlling question in the cause.

Other questions were raised, and other exceptions filed, unnecessary to be repeated here.

G. R. HUNTER, for plaintiff in error.

S. HALL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The rule of law regulating this action, requires that two things should concur to support it: An obstruction in the road by the fault of the defendant; and no want of ordinary care to avoid it, on the part of the plaintiff. (*Batterfield vs. Bridgeman*, 11 East. R. 60. *Bridge vs. Grand Junction*, 8 Eng. N. 228. 1 M. & G. 508.).

This was a public road existing by prescription; and consequently, required no written authority, emanating from the Superior Court, to prove its existence as a highway. It is conceded however that the plaintiff was dug across it by the defendant, and that too, without authority of law to do it. The first branch of the case is therefore made out; to-wit: an obstruction to the road by the fault of the defendant; and it only remains to inquire, whether or not the plaintiff exercised ordinary care to avoid it?

He directed his servant, in the first place, to examine the bridge across the race, to ascertain whether it could be passed, and found that the holes made by the slipping of the plaintiff,

Bridges v. May

undertaken the greatest dangerous. He then turned aside, intending to cross at another place; and again the driver is made to dismount and explore the condition of things, who reports that it is entirely safe and easy to cross, as the water was not more than deep. He forces the reluctant mules to make the effort, and they are drowned—the instincts of these long-eared animals being more unerring than the boasted wisdom of man. By a precipitous flunge the end of the tongue or pole was fastened in the opposite bank, and the heads of the mules, being held down by the breast-chains, they could not be extricated in time to save their lives.

Could the master, then, acting upon the information of his servant, be considered as having exercised ordinary care? He did but follow the common practice of the country. Is it not the universal custom, in pursuing a journey, when an obstruction occurs, to consult the driver, and to act upon his opinion? And if this be the common practice, Mr. May could not be said to be wanting in ordinary care in following it.

It may not be amiss to take this occasion to suggest, that every unauthorized change of a public road, in this State, (and nothing is more usual,) subjects the persons to the consequences which have been visited upon this defendant. How common is it, in clearing a new-ground, to run the fence on the old road, and to compel the travelling public to wear down the stumps and other obstructions in the new? Land proprietors would do well to take heed to their ways, in this respect, and in reference to this clear legal liability. And let it not be said, as has been falsely charged, as to other decisions, that this is some new-fangled doctrine originating with this Court. It is laid down in *Sax. Canehead*, who reported, in the reign of King Edgar, that if a man lay logs of wood across a highway, though upon a road, with care, ride safely by, yet, if by means thereof, my horse stumble and fling me, I may bring an action. (C. 194, 457. See, also, *Buller's New Practice*, 26.) But the modern rule is more lenient, and notwithstanding the defendant be in fault, it does not dispense with another's using ordinary care and caution for himself.

Roseberry vs. Roseberry.

No. 29.—JAMES D. ROSEBERRY, plaintiff in error, vs. CATHERINE ROSEBERRY, defendant in error.

[1] Upon consideration of an application for alimony, by C. R., pending a suit for divorce by her, against J. D. R., and where J. D. R. filed his idea respecting such application, on the ground that he had never been lawfully married to C. R., and proposed to make proof of the same: Held, that such plea should have been entertained; and that it was error in the Court below to reject such proof, and to grant the application for alimony. Held, also, that it was competent for the Judge, without the aid of a Jury, to accept, tried and decided such issue.

Divorce and alimony, in Stewart Superior Court. Decision by Judge CRAWFORD, October Term, 1854.

Catherine Roseberry's libel for divorce stated, as grounds, adultery and cruel treatment. An application being made for temporary alimony, James Roseberry, made answer, that though married in fact to libellant, the marriage was void, in law, because she had a living husband at the time of the marriage, and who is still alive. On the hearing, he proposed to prove these facts, and prayed a Jury to determine this jurisdictional issue.

The Court refused the motion, and granted the application for temporary alimony. This decision is assigned as error.

B. S. WORRILL and J. JOHNSON, for plaintiff in error.

TUCKER & BEALL, for defendant in error.

By the Court.—STARKEY, J., delivering the opinion.

The Court below seemed to think that the plaintiff in error, in his answer to the petition for alimony, had admitted his marriage with the defendant in error; for such admission is assigned as a reason why the Court should adopt the rule, that upon proof of marriage, and suit for divorce, alimony will be decreed, almost as matter of course.

Roseberry vs. Roseberry.

This rule is correctly stated. It obtained in the Ecclesiastical Courts, (*Mayhew vs. Mayhew, & Eccl. R. 168*.) and we have adopted it in this State. (*McGee vs. McGee, 10 Ga. R. 488. Methvin vs. Methvin, 15 Ga. 97.*). But we think that the Court below erred in supposing, that in the case before them, this rule required him to reject the issue tendered.

His Honor assumed that the marriage was proven by the admission of the plaintiff in error. On the contrary, he expressly denied it, alleging that the ceremony had been performed, when the parties were supposed to have been married; but that the defendant in error was, at the time, a *feme covert*, having a lawful husband then in life, and who is still in life.

The marriage being thus denied, there was no proof of it, nor anything that was equivalent to proof of it, before the Court: and we think he should have entertained the issue which the plaintiff in error proposed to make, and have heard the evidence which he avowed a readiness to produce, for the purpose of sustaining his plea.

His Honor was also of the opinion, that to allow this inquiry, would have been to enter into a trial of the case upon its merits. The merits of the case, for divorce, rested upon the charge of adultery. Though, of course, there could have been no adultery without a marriage between the parties; yet, the marriage was a preliminary—a matter preliminary and necessary, not only to the act of adultery, but to the right of the defendant in error to proceed with her suit for divorce; and the first or substance of the suit, was the charge of such conduct on the part of the plaintiff in error, as authorized the Court to dissolve such marriage. The rule that the Courts will not inquire closely into the merits of the case for divorce, upon consideration of the application for alimony, excludes the idea that the question of marriage is regarded as part of these merits; for it is immediately coupled with the proposition, that upon proof of marriage and suit for divorce, the Court will not inquire into the merits, &c. The proposition therefore is, that upon proof of marriage and suit for divorce, the Court will not, in such a

Sneling, adm'r, &c. vs. Derrell, &c.

proceeding, closely inquire into the guilt of the defendant, and the plaintiff's right to a divorce. And this very rule, which the Court below invoked as a guide in his judgment, precludes the inquiry into the merits, only where such marriage is proven.

But whilst we think the Court should have heard proof as to the fact in question, we do not agree with the Counsel for plaintiff in error, that the issue should have been submitted to a Jury. By analogy to the practice of the Ecclesiastical Courts, the Judge was competent to hear and decide upon this and all other questions necessary to a determination of the applicant's right to alimony.

For the judgment be reversed.

No. 80.—RICHARD J. SNELING, administrator, &c. plaintiff in error, vs. SARAH DARRELL, by her next friend, &c. defendant in error.

[1.] Under the Act of 20th Feb. 1854, to change and simplify the practice and proceedings in this State, a motion for a new trial may be amended so as to include an additional ground, not taken at the time the application was filed?

In Equity, and motion for a new trial, in Stewart Superior Court. Decision by Judge CRAWFORD, October Term, 1854.

A motion was made to amend the rule nisi for a new trial, by adding two grounds, founded on newly discovered evidence. The Court refused the motion to amend, and this decision is assigned as error.

The bill, in this case, was filed to recover a legacy under the will of Henry Canaday. By that will, he bequeathed the bulk

Snelling, adm'r, &c. vs. Darrell, &c.

of his estate to five legatees, his daughters. A subsequent item prescribed, "I hereby direct that the devises and bequests herein made to my said daughters, shall be entire and free from all claims in their behalf; and if any claim should be set up, at any time hereafter, against my estate, by any of my daughters, or in their right, for the hire of negroes, or for any other cause whatever, I hereby direct that the share of my estate herein given, of such as set up such claim, or in whose right the claim is made, shall be wholly forfeited; and said share be divided among my other daughters, pursuant to the directions of this my will." The will bore date in 1839. Testator died in 1843, without changing its provisions. Subsequent to 1839, Darrell and his wife (one of the daughters) brought suit against Canaday for the hire of certain negroes. Prior to Canaday's death, the suit was dismissed, at his cost.

Snelling, as administrator of Canaday, distributed the legacy, excluding Mr's. Darrell.

This bill was filed to recover her share. On the trial, the Court charged the Jury, that "the intention of testator was to be arrived at by settled rules in Equity, and that the rules of construction by which the intention was arrived at, was a question of law for the Court; and the Jury were bound to respect the opinion of the Court." This charge was the first ground assigned for a new trial.

The Court farther charged, that the complainant had not forfeited her legacy under the will by the suit, during her father's life. This is the second ground taken for a new trial.

The Court refused to charge that "dead men could have no estate," but charged, "that a man might leave property at his death, which might be and was usually called 'his estate.' This is the third ground taken for a new trial.

The Court allowed evidence to be given in, to show the value of the negroes and other items of the legacy, at the time of the trial; and also the opinions of witnesses, as to the value of the negroes, their ages and general condition being sworn to by others. This is the fourth ground taken for a new trial.

The Court charged the Jury, that their verdict could only

Sachling, adm'r, &c. vs. Darrell, &c.

to get money, the negroes having been distributed. This is another ground taken for a new trial.

The Court refused to instruct the Jury, (after their discharge), to deliver to the Counsel the calculations on which their verdict was based, which were admitted to be still in their possession, the Court stating that it was discretionary with the Jury to do so or not. This was another ground taken for a new trial.

Another ground was, that the verdict was for an excessive amount. On this ground the Court below certified that he had made a laborious calculation, himself, which resulted in a larger amount for complainant than the Jury found.

The overruling of this motion, for a new trial, on the several grounds stated, is the error complained of in this case.

Judge BUCKING having been of Counsel, did not preside in this case.

TUCKER and H. HOLT, for plaintiff in error.

S. JONES and GAULDEN, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

[1.] Has a party the right to amend a motion for a new trial at the hearing, so as to include other grounds besides those originally taken?

Newly discovered testimony was the foundation of the application in the present case; and it consisted of two items—1st. A return made by Sachling to the Court of Ordinary, in March, 1845, which he swears he searched for diligently, and was unable to find at the trial, and which the inscrip. will allow an indebtedness of the estate of Capaday, to him, of \$1102 ¹²/₁₂, and for which he has been allowed no credit. 2dly. The evidence of one George Rich, by whom the defendant proposes to prove, that the complainants in the bill were notified by the testator, that he had made his will, and had directed the Testimony of

Sneling, adm'r, ex. vs. Dorrill, &c.

his daughter's legacy, provided she brought suit upon it which she set up to a portion of his negroes and the hire thereof.

Had the defendant the right to amend his rule nisi, so as to include this additional ground? If so, he must derive it from the Act of February, 1854, "to change and simplify Practice and Pleadings in this State." (*Duncan's Dig.* 20.) But in the *Executors of Riggins vs. Brown*, (12 Ga. L. 272,) this Court held that a rule nisi for a new trial, could not be amended, by the addition of new grounds, after the application was filed. By the Act of the last Legislature, parties, plaintiffs or defendants, whether in Law or in Equity, are entitled, as of right, to amend their *pleadings*, in all respects, in any stage of the case, subject, however, to be taxed by the Court with costs, provided the party applying has been guilty of negligence; and subject to such other reasonable and equitable terms as the Court may see fit to impose, not affecting the real merits of the case.

Is, then, a motion for a new trial a part of *pleadings* in the cause? Pleadings have a restricted as well as a general meaning. The one is denominated regular, and the other irregular or collateral pleading. The former begins with the declaration and terminates with the issue of fact or of law, or both. (See 3 Vol. *Black. Com. Title Pleading.*) The latter includes bills of exceptions, writs of error, motions for new trials and every thing which transpires during the progress of the cause, from its inception to its consummation. (*Viner's Abbrev. Pleas & Plead. C.*)

The question then recurs—in which sense did the General Assembly intend to use the term in the Statute? We cannot hesitate to conclude, taking the whole tenor and spirit of our laws into the account, that the term pleading was designed to be used in its broad sense, and that, consequently it includes a motion for a new trial; and to deduce as a corollary, of course, that the same may be amended so as to include a ground not taken when the application was filed.

Must we, then, reverse the cause? We are still re-

Walker *v. al. v. Cook.*

quired, imperatively, to do so, on account of this error, as we are under the New Trial Act. Still, if, from a mistake of the law, the party has lost an important right, he is entitled to redress. Now the view we take of the matter is this: The testimony of George Bish is inadmissible, because incompetent. What the testator said on this, after writing his will, can hardly, we suppose, be looked to as one of those surrounding circumstances referred to in the books, in the light of which the will is to be interpreted, and which may be proved by parol. But the return for 1844, made the ensuing March, ought to have been before the Jury, to enable them to take a correct account between these parties. It exhibits, according to the record, a balance of \$1102.15, in favor of Snelling, the administrator, upon the receipts and expenditures of the current year. Unless, then, the complainants will scale their decree to the amount of their portion of this sum, with interest thereon, from March, 1845, to the date of the recovery, a new trial must be granted; and it is accordingly ordered.

We affirm the judgment below upon all the other grounds, suggesting, merely by way of reservation, that in prescribing rules for interpreting wills, some slight modification in the terms employed by the Court would have been desirable, with a view to greater accuracy. We somewhat doubt, also, as to whether or not, the testimony of Bynum and Mercer should have been let in, until it appeared that it was the best which the nature of the case admitted of. To say the most of it, it was very vague and unsatisfactory; scarcely definite and certain enough to make the basis of a verdict.

Hester vs. The State.

No. 31.—JASON MEREDITH, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] Where Jurors, in a criminal trial, for an offence committed before the 16th day of February, 1854, as they were called up, were asked by the Solicitor General if they had any conscientious scruples as to capital punishment, and his objection was made by the prisoner's Counsel, the attention of the Court not being called to the same, and no decision pronounced thereon: *Held*, that no error was committed by the Court.
- [2.] The Court was asked, "generally," by the prisoner's Counsel, "as the Jury were about retiring, to charge them, 'as to confessions,'" whereupon he gave them in charge the general principles on this subject, in which he stated that confessions, when freely and voluntarily made, were the highest kind of evidence; but in the course of his remarks, also told them that they must weigh them as any other testimony: *Held*, that this charge, under the circumstances, was sufficiently correct.
- [3.] A Court should not interfere with the verdict of the Jury, because several of the principal witnesses were intoxicated at the time of the transaction, if there be other evidence, and especially the confessions of the prisoner, to support the verdict.
- [4.] Voluntary drunkenness, whatever its degree, is no excuse for crime.
- [5.] A statement was made in presence of a Juror, before trial, in relation to the homicide. The Juror said, "if that were so," the prisoner "ought to be hung." When called up on the panel, he was not put upon his *voir dire*, and was taken by prisoner and sworn. After verdict of guilty, a motion for new trial was submitted, based upon affidavits that he had been heard to utter the above expression: *Held*, that the Juror appeared to have no fixed opinion on the subject, or prejudice against the prisoner; that the observation was guarded by the expression, "if that were so," &c. and that such an opinion as he appeared to have formed, would no doubt have regard to the evidence delivered under oath.
- [6.] Where a unanimous verdict is returned into Court, and entered upon the minutes, the statement of one of the Jury, after he is discharged, that he had not agreed to the verdict, but suffered it to be brought in because he could not control the rest of the Jury, must be held to be contradicted by the record: *Held*, also, that a Juror cannot be suffered, in this way, to impeach the verdict.

Murder, in Stewart Superior Court. Tried before Judge CRAWFORD, October Term, 1854.

The first errors assigned in this case are, that the repre-

Hester vs. The State.

tion, "Have you any conscientious scruples as to capital punishment," was put to the Jurors on their voir dire, though the offence was committed prior to the Act prescribing that question. Defendant made no objection, at the time, nor was the Court called in to decide upon the legality of the question.

The main error complained of, was the refusal of the Court to grant a new trial, on the ground that the verdict was contrary to the weight of the evidence.

The evidence adduced to the Jury was as follows:

Willey King was present the day of the homicide of Lee. It was done at Cleon Clement's, in Stewart County. The ~~one~~ he knew of, the difficulty, Green R. Lee (the deceased) knocked down Samuel Wright, and stamped him; and told him to leave, without scaring; that he had promised to vote a Whig ticket and had voted a Democratic ticket. Wright, as quick as he could, got up from under Lee, and left the house. Lee was standing in the door chasing Wright when the physician took place. Clerks and witnesses were lessening on the counter talking to each other. Witness heard a scuffle behind him. He paid much attention to it at first, but hearing such a noise, he turned around to see. He saw Mercer and Lee; Lee was about one pace from Mercer, leaving the house, apparently in great haste. Witness saw blood shining on the floor, and Mercer was standing with a bloody knife in his hand; his hand and his face were high covered with blood, and blood was dripping from both. Witness stepped up to his side, saw him shut his knife and put it in his pocket. He, Mercer, followed Lee out of doors, and witness followed Mercer. Witness saw Lee lying on the ground ~~out~~ of his body & Mercer stepped up in 4 or 5 steps of him and stopped. Witness observed to Mercer that he (the latter) had killed Lee, and that he must stay there until the families of Lee and Mercer were both sent for. Witness took hold of Mercer and a short barrelled gun which Mercer held in his hand. Upon witness telling him that he had killed Lee, Mercer said, did you see me do it? Witness told him that he did not see him hit him the kick or licks which killed him, but ~~did~~ by saw him, with his bloody knife and the

Better vs. The State.

face and hands, all dripping with blood; that he saw him take his knife and put it in his pocket. When witness told him that, he, Mercer, after a little while, set aside the gun which he had held, slipped his hand into his pocket, pulled out his knife, and threw it away. Witness told the crossed present where they might go and find the knife; they hunted for it there, and found it. Old man Lewis Lee and his family came up about this time, and witness gave Mercer up to Lewis Lee — Lewis Lee was, bairly, telling L. Lee, that he ought to do as he pleased with Mercer, and L. Lee said he would try and take care of him. Lewis Lee pressed witness, in behalf of the State, to help guard him that night. Witness said he would do no such a thing, unless he, Lee, got a rope and confined Mercer. A rope was sent for, and put around Mercer's neck; witness said, that somebody might give Mercer a knife to cut loose, and suggested to have his hands tied down. Another rope was obtained, and Mercer's hands tied down with it, prisoner at the bar is the Mercer spoken of by the witness; the difficulty commenced a short time after dark, there was a candle burning in the room; witness was not exceeding three steps from where he saw Lee and Mercer, when he turned around to look, after hearing the skirmish, did not see or hear any body else in the room when he so turned around, except himself, Chapman, Lee, and Mercer; thinks that if any other one had been in the room, he would have seen him. From what he saw and heard, he thinks only the four persons above mentioned were in the room at that time. Prisoner did not have his gun inside of the room, but as witness thinks, he got it in the porch. Mercer was very bloody, the right side, the right hand and the right side of his face, were all bloody, and dripping with blood. Green Lee had fallen down, and as witness looked, was dead when witness and others got out to him; the boy got more than half a dozen steps from the house; witness saw the stomach of Lee suspended after Lee's death; and six weeks after Lee, one vein under the left jaw, and the neck vein was there cut in two; one being below that, just above the collar bone; and the vein was cut in two there also; another was on the front part of the neck;

Hester vs. The State.

holes about where the skull and neck join; two others were on the left side, situated rather towards the back; one was nearly, but not quite in the center of the breast. Witness thinks that one of the wounds in the side seemed to reach the hollow, and as some thought, cut his liver; the wound under the left jaw, witness thinks was about an inch or two deep; it was large enough to swallow the whole knife blade.

Wiley King, cross-examined for the prisoner, says: that prisoner was, as far as witness knows, a man of peaceable and sober character. Witness had lived near him some 8 or 10 years. Green B. Lee was, as it was said, Mercer's brother-in-law. Witness knows nothing against Green B. Lee's general character for peace and quietude. Witness saw deceased on Friday after dark; deceased had a fight with Samuel Wright on the night of the day of the killing. Samuel Wright was standing near the door doing nothing, when deceased knocked him down and stepped on him. Deceased told Wright, he, deceased, had promised him, deceased, to vote a Whig ticket, and that he, deceased racial, had voted a Democratic ticket. deceased called Wright a damned rascal and damned scamp, and told him to leave, and was羞ing him up to the time the scuffle took place with deceased and prisoner. Wright did not return after deceased had knocked him down; nor did deceased knock Wright again. Deceased was standing in the entrance of the house, cursing and abusing Wright. Wright had gone out of the house; as humble as any negro or dog, but witness does not know whether Wright went out in the pitch dark. In the yard, witness saw the fight between deceased and Samuel Wright, but did not see Mercer, the prisoner; at the time witness heard the scrimmage, witness turned into the house; he did not see prisoner strike a blow. Witness heard deceased say "I'll get you," the time deceased knocked Wright down, up to the time the scrimmage took place. Witness has frequently seen deceased and prisoner at gatherings together as friends witness knows they were friends. Witness does not know that prisoner was drunk on the day the killing took place. deceased did not see prisoner drunk. Witness did not

Hester vs. The State.

see or hear of deceased being in any other difficulty than day or night. Witness and deceased had no difficulty with each other on that day or night. Witness was a little groggy on the fore part of that day. Witness did not drink any in the evening, according to witness's best recollection and knowledge. Witness did not drink any after three o'clock of that day. Witness was not drunk at sunset of that day. Witness did not, after sunset, have out his knife in his hands with his sleeves rolled up, and swear he would have his supper off of that crowd before he left there. Witness does not know any thing about his walking about in a gage with his sleeves rolled up after sunset of that day, cursing and swearing. Witness at the time of the killing, lived about four miles from the place where the killing took place. Witness moved from the place he then lived at in January last. Witness now lives in Jefferson County, Alabama, some sixty or seventy miles from the place. Witness was here at last Court as a witness in this case. Witness then lived where he now lives. Witness states, however, correction, he, witness, was not drunk at sunset, but had been in him. Deceased, as witness looked towards the door from where he stood by the hospital, was to the right of the door. Witness did not enter into any details as a witness, to remain here until last Court.

James H. Jackson, sworn upon the part of the State, said: On the 12th day of November, 1853, at Burntstown, Jefferson County, Ga., witness got the night of that day, and started from Burntstown, but does not recollect how far, hearing a noise of talking behind; witness supposing there was going to be a fight, determined to go back and see what it was. When witness got back, Wiley King was holding prisoner, with one hand and a double barrelled gun in the other. Mr. Wiley said to prisoner, he, prisoner, could not leave there, and further he had killed deceased, and that he, prisoner, could prove it. Mr. King said to prisoner you have killed Green M. Lee, and Mr. Lee was lying on the ground before the door, dead-like, just prisoner there, till Mr. Lee, the father of Green M. Lee, who said prisoner had killed his son, and had nothing to do with

Hearer to, The State.

comes spoke very low, and said he had done nothing more than he wanted to do, and did not care if they hung him or what they done with him. Prisoner, after this, spoke to me, witness, very low, and said he had a ten dollar gold piece which he would give me, witness, if I would cut the rope and let him get away. Witness was called upon by Mr. Lewis Lee, an officer, and required to assist in guarding the prisoner during that night. Witness was guarding prisoner, or acting as a guard, at the time prisoner offered him the ten dollar gold piece to cut the rope and let him get away. Witness went to Bumbletown in the early part of that day. Witness left to go home about a half an hour after night, and had gone some sixty yards, when he heard the noise alluded to above. Witness saw Mr. George B. Lee and Mr. Sam'l Wright there on that day drunk, Maj. said nobody else there drunk that day. Deceased knocked Sam'l Wright down and kicked him, as witness heard others say; before witness left. Mr. King and Mr. Clements were not drunk after night; nor was witness drunk—if there was any ordinary grocery after night, that did not drink with us; witness does not know it. Witness thought all were staying to keep their names. Witness did not, on his return, see Mr. Wright immediately. Witness was not present when prisoner was tied with the rope. Mr. King and Clements assisted to get the rope that night. Mr. King, Clements, prisoner and witness were in the grocery when Col. Lee remarked, prisoner had killed Major, and that he should hang for it. The grocery was about 100 feet square, clear of the counter, as near as witness can guess at it. Witness thinks he did say, on his own knowledge, Col. Lee remarked that prisoner had killed Major, and that he, prisoner, should hang for it, and he still thinks Col. Lee said so. At the time the remark was made, witness was sitting down in the back part of the house, and was not near the place where prisoner. The offer, by the prisoner, to give the ten dollar piece to witness, to cut the rope and let him get away, after Col. Lee made the remark alluded to. Witness does not know when after night it was when the offer of the gold piece was made by prisoner. Witness did

Braman vs. May...

not mention to any of the guard the offer of the ten dollar gold piece, to witness, on the part of the prisoner. Witness does not recollect to whom he first mentioned the offer of the bribe; it was some time after prisoner was put in jail, that witness mentioned to Col. Lee the offer of the bribe; and also, the statement of prisoner to the remark of Col. Lee, that prisoner should hang. This conversation with Col. Lee occurred the first of December, about the time witness wanted to go to Philadelphia. Col. Lee then had witness subpoenaed, but does not recollect whether it was then December or a little before. Witness's home was at Mr. Barnett's and Mr. Hendricks' at, and about the time witness made the commitment, as above. Witness has been staying at Mrs. Lee's, the mother of defendant, some, early in the year, and has been picking cotton there this fall; and yes there some little in the summer. It was sometime after prisoner came up here and was put in jail, that witness made to Col. Lee the communication, that prisoner offered witness a ten dollar gold piece to cut the wire and let him go on the night of the killing, and what witness heard prisoner say, in reply to Col. Lee's remark, that prisoner had killed his son, and should hang for it, that he had done nothing more than he wanted to do, and what he did not know what they done with him—whether they beat him or not. This communication was made before witness came to testify at the commitment trial; witness does not know it might not have been more than a week ago.

Clem Clement's third witness, on the side of the defense. Witness was present when Mr. Green B. Lee and witness and Wiley King had been standing talking to each other across the counter; witness thinks he turned, while turning back, W. King turned off and started out of the room, he was in two or three feet of the door going out, witness does not recollect that any one was in the room, but he thinks the fracas commenced, but Green B. Lee, D. C. Lee, and Wiley King, and went out of the room, and witness followed, presented himself to the officers outside of the house; when he got out he was told he must come in.

Mercer vs. The State.

steps out in the yard and prisoner was standing, with a double-barrelled gun in his hand, in the piazza; and Wiley King said to prisoner, you have killed that man and I am going to take you, and took hold of prisoner and the gun at the same time; and after holding awhile King said, prisoner you had as well stand still, for I have got you. Then King said prisoner took something out of his pocket and tossed it off; King pointed to where the prisoner threw the knife or whatever it was, and Mr. Elias Taylor and John Mercer, prisoner's son, went to hunt the knife or whatever it was, and John Mercer found a knife — a white handle, double-bladed knife, and should take it to be worth fifty cents. The knife was bloody when it was picked up; it had fresh blood on it. When John Mercer carried some clothes home from this place, he stopped at my grocery; I believed the clothes to be those the prisoner had on when he killed dec'd; I examined the left pocket first, and found no blood in it; I then examined the right pocket, in which had apparently been a bloody knife; there was right smart of blood on these clothes. When witness noticed prisoner his right hand and his face was bloody all over; there was right smart of blood spilt on the floor of the house; there was right smart of blood also on the ground where deceased fell; deceased did not move hand nor foot, as witness could see, after he fell. The puddle of blood inside the house was some 3 or 4 feet from the door. Witness should take prisoner to have been sober that day, as prisoner did not take but two drinks that day that witness saw. All this occurred on the 12th day of last November, in the 21st district of Stewart County. Prisoner frequently visited witness's grocery; at any other day when prisoner came to witness's grocery and was asked to drink, prisoner was always ready to take some with them; but on that day he refused over and over again. Witness does not think that prisoner had the gun in the house, but does not know. Prisoner did not muster that day; prisoner was in the house at the time of the muster; prisoner looked like he was perfectly sober when he came to the grocery. Witness did not put it down that any

Mercer vs. The State.

one asked prisoner to drink that day, and therefore he cannot say: Prisoner was particularly called on, by name, by more than one, to drink, and refused. W. King drank some that day; witness did not see him refuse that day; witness saw King, after this happened, drink; witness does not think he saw Mr. King drink any right before the fracas commenced; witness drank some that day; does not know that any one asked him to drink with them that day, and does not know that he refused to drink with any one. Mr. King was not so drunk that he did not know what he was about; witness was not drunk but had been drinking; did not consider Mr. King drunk at any time that day, but had been drinking; thinks Mr. King slacked off drinking before night; does not recollect any thing of Mr. King's cursing and swearing in witness's piazza, between sunset and dark. Witness slept, that night, on a sheep-skin in the grocery; went to sleep that night about 12 o'clock, before or after; thinks King was awake when witness went to bed; witness did not get up that night till morning, when he got up for good that day. (Question asked witness.) Did you not tell Thomas Childers, at Henry Harrison's on next morning after the killing, that you were so drunk you did not know any thing about the case? Witness answers—He did not. (Question.) Did you, at Bumbletown, a day or two after the transaction, have a conversation with Green D. Sims, in which you said that you were so drunk that you knew nothing about the case? Witness answers—He did not. Prisoner's general character, as a peaceable man, so far as I know was good; he was always peaceable about me, until that day. Witness has been acquainted with prisoner for ten or fifteen years. Dec'd, when drunk, was an insulting, turbulent and overbearing man. Witness thinks Mr. King might have had more liquor in him in the evening than at 12 o'clock, and not have shown it.

Franklin A. Cartlidge, 4th witness on the part of the State, sworn, says: Witness was at Bumbletown, in this county, on the day that Green B. Lee was killed; it was dusk when witness left there; that day, after they got through mustering, deceased jumped up into the piazza and said, all you good

Merger vs. The State.

Union Scott Whigs come up and take something to drink on my expenses; and prisoner said—did you hear that? and repeated it twice; and some one spoke and said—yes, but I would not care for it. Prisoner then threw himself back and run both hands into his pocket, and drew his knife so that witness could see half the handle, but did not pull it clear out, and gritted his teeth and said, 'mankind, I will make him suffer for them very words; I will take satisfaction out of his body before I leave this place, or before we'll leave this place, one or the other.'

Examined on the part of the defence: Witness left Charles Matthis on the morning of the killing, and got to Bumbletown between 12 o'clock and sun-up, but does not recollect the exact time; as near as he can recollect, it was between 8 and 10 o'clock; when witness got to Bumbletown muster had not commenced when witness got there; Chas. L. Matthis went with witness that day; Green B. Lee commanded the muster that day; the muster took place facing the piazza, between it and the road; it is about one hundred yards from the piazza to the road. Witness returned to Stewart County in July or August, 1853; left Bumbletown about deep dusk, nearly dark, on the day of the muster; did not see Mr. King after sun-down; and the last time witness recollects him was about $\frac{1}{2}$ or $\frac{1}{4}$ hour before sun-down. Witness cannot say, at that time, that King was drunk, though he had been drinking; nor cannot say that he was half drunk, though Mr. King was mad; there had been a little fuss there that day, between Crawford and Fussell; Mr. King and deceased had no difficulty that day that witness knows of; witness was not in the grocery after sunset. From about sunset until I, witness, left, witness, as well as he can recollect, was in the yard; witness did not see King have out his knife about half hour before sun-down. Green Lee was not drunk, but had been drinking, and was in liquor; it was in the evening, after 12 o'clock, that the muster broke up. Witness cannot say that it was 2, or 3, or 5 o'clock; it was awhile after the muster broke up, that deceased jumped up into the piazza and asked all the Union Scott Whigs to come up

Mercer vs. The State.

and take some liquor; witness cannot say whether it was half an hour, 2 hours or 3 hours; it was late in the evening; witness cannot state who was standing round prisoner at the time he made the threats against deceased, as he knew precious few men there; there were some three or four, and may be more, but I do not know the men but one, and that was Mr. Lee, the old gentleman. Witness told Charles L. Matthis, as witness and Matthis went home, that he heard prisoner make the threats spoken of before against deceased, and Matthis was the first one witness mentioned it to; the reason witness did not tell Col. Lee of it, he was afraid he would have to be a witness. The knife which prisoner drew so witness saw the handle, was a white handle knife—kind of a round handle knife; witness thinks that that was the first day he had been to Bumbletown. Jacob Mercer, the prisoner, is the person witness heard make the threats spoken of.

Mrs. Mary Ellis. Witness went to Bumbletown, in this county, on the night Green B. Lee was killed, in company with Mrs. Mercer, wife of prisoner, and her children; witness had heard deceased was killed—this was the cause of her going; witness heard prisoner say he did kill Green R. Lee, and would do it if it was to do again; witness was some three steps from the prisoner at the time of his saying so; witness thinks, of late years, prisoner, when drinking, was cross and contrary in his family, and lay off a good deal; witness identifies the prisoner at the bar as the one who made the assertion that he did kill the deceased, &c. and examined for the defence. It was some 9 or 10 o'clock when witness heard prisoner make the remark, as she thinks; prisoner was in the piazza of the grocery at the time; there were a good many in the piazza at the time; there were men around prisoner at the time, closer to him than witness was; witness thinks it was Eaton Jackson was talking to prisoner at the time; if so, is not mistaken; witness expects there were a good deal more than a half dozen in the piazza at the time this remark was made. Witness staid all night at Col. Lee's the night before she came up to town to be sworn as a witness at the commitment trial of prisoner; she

Mercer vs. The State.

had been subpoenaed as a witness a day or two before that, and had been sent for by Mrs. Lee to come there and stay all night. Henry Harrison was in the piazza at the time prisoner made the remark, that he had killed deceased. Prisoner, at the time he made the remark, spoke in a common tone of voice. Witness does not recollect that she told any one of this statement of prisoner, except Mary Crompton, until she was sworn here on the commitment trial. Prisoner did not bear the name of a very quiet man in the neighborhood.

Samuel Wright, 6th witness on the part of the State, sworn, says: Witness was at Bumbletown, in the 21st dist. in this county, the morning after the killing of Green B. Lee. On that morning, witness asked prisoner how he felt; prisoner answered he would feel better if he had some coffee. Witness then asked prisoner how he felt about the scrimmage or fracas of the over-night, or what he had done, his answer was, "Sam I have done nothing more than I expected I would do four years ago. Prisoner at the bar was the man witness was talking to. Prisoner was in the piazza of Clem Clements' store at the time—the remains of Green B. Lee were in the piazza at that time. Witness did not examine, but saw the wounds on the body of deceased on Sunday night. Deceased had six wounds on his body, two on the neck, one in the edge of the hair, one wound was under the ear, across the neck, wide enough to have laid witness's finger in it, an inch and a half long—it looked like it might have been an inch deep; the other wound was under the first, near the collar bone, and looked like the knife went straight in and out. There were two wounds on the left side, which witness thinks entered the hollow, the other wound was near the left nipple. From witness's examination and the appearance of the wounds on the body of Green B. Lee, witness thinks he must have come to his death from them. The upper wound on the neck looked like it went immediately across the large vein in the neck. Witness has known prisoner some 12 or 14 years; during all that time prisoner has been a peaceable and quiet man, so far as witness knows; part of this time witness lived in the yard and in the

Mercer vs. The State.

edge of the yard of prisoner. Witness was with prisoner frequently when sober and when drunk; so far as witness knows, prisoner was particularly friendly to Green B. Lee; the deceased; witness has known deceased some 12 or 14 years; witness would count deceased, when in liquor, to be an insulting, turbulent and overbearing man, and did not seem to care who he insulted. Witness was at Bumbletown the evening of the killing; witness did not know what occurred the night of the killing. Witness was drunk and don't recollect any thing about it. Witness does not recollect any thing of being knocked down and stamped that day; witness drank some before the muster, but was not, at that time, drunk. Witness recollects all very well during the muster; witness cannot tell any thing about whether Wiley King and Clem Clements were drunk or not. Mr. Mercer, the prisoner, mustered that day; there were some 3 or 4 persons in the piazza at the time witness heard prisoner say he had done nothing more than he expected to do four years ago, &c. The prisoner said nothing about killing Mr. Lee in those remarks; does not know that he, prisoner, had any reference to it; prisoner said, about a month or two before the killing, when about to leave my house to come to Lumpkin, shook hands with me and wife and the children, and stated he was always sorry to leave his friends, for he did not know what might happen before he got back. Question. Did you not swear, at the commitment trial of prisoner, that at the time of the confession of prisoner to witness, that Wm. McCree was present? Answer: If witness so testified at that trial, witness does not now recollect; witness does not recollect that Mr. McCree was in the piazza, but to the best of his recollection he was on the ground; witness does not remember whether he swore, at the commitment trial, that G. D. Sims was present in the piazza at the time or not; witness does not recollect that he testified, at the commitment trial, as to the names of any particular persons being in the piazza at the time of the confession by prisoner to witness; witness says, that it seems to him that Mr. Perkins was in the piazza, and so might Mr. Wade have been in there. At the time that pris-

Mercer vs. The State.

oner made these confessions to witness, witness thinks he was sober enough to recollect; witness had taken one drink, that he recollects, and had drank so much the over-night, that he felt very bad at the time that prisoner made these confessions to witness; witness considered him a drunk man, but he might have been more sober than he took him to be. Witness had blood on him next morning after the killing—does not know how it came there.

Re-examined by the State: From the appearance of the wounds on deceased, witness thinks they were made by a knife; witness saw blood in the house, in the piazza, and out of doors, and on the counter too, on the floor and also some on a barrel head in the house. The blood which was upon witness was on his shoulder and down his breast. Witness does not know how he got the blood on him; the counter was about waist high; witness does not recollect sitting down by prisoner that night; witness remained on the ground the whole of Saturday night; witness was in the grocery next morning after the killing, and took a drink at the counter. The blood on the counter looked fresh; witness says there was no other fracas the night of the killing that he knows of, except the one between prisoner and deceased; witness does not know, of his own knowledge, that there was any fracas between prisoner and deceased that night; witness saw blood, in splotches, all about over the floor; the blood on the counter was sprinkled about on the counter for 2 or 3 feet; one puddle about the size of his hand, not more than 2 feet from the end of the counter; witness had blood on his face next morning after the killing; the blood on the counter was about 2 feet from the end of the counter nearest the door.

Charles T. Connelly, 7th witness on the part of the State, says: When he was passing by Clem Clements' grocery on Sunday morning after the killing, he saw a man lying in the piazza of the grocery, in the North end, that he supposed to be deceased; he saw, at the same time, prisoner at the South end of the piazza, apparently confined; then witness drove within 25 or 30 yards where the dead man was lying, and walked towards the end of the piazza, where the dead man was lying.

Mercer vs. The State.

and met 'squire Johnson just before he got to the end of the piazza; after a few words conversation with Mr. Johnson, we walked together to where the dead man was lying, and saw the wounds from which he supposed he had come to his death. Witness walked away from the deceased, and was called twice by the prisoner to come to him; he then went to prisoner; as he was approaching prisoner, prisoner says, Connelly, I am in strings; witness replied, I see you are, and I am sorry to see it; witness, upon approaching prisoner shook hands with him; witness then asked prisoner, Mr. Mercer, how came you to kill Lee, or what caused you to do it? His reply was, I can't tell you now what caused me to do it. I then asked Mr. Mercer if they were in a tow or difficulty, that caused him to kill him; prisoner replied no, there hadn't a word passed, between us. He then went on to remark, it is done as you see it there, but I cannot tell you now what caused me to do it, but I will acknowledge the whole truth to the Court. Witness say 3 wounds upon deceased, one just back of the bur of the ear, one about midway his neck, and one just where the neck and collar bone join. The 2 wounds upon the neck had the appearance of deep wounds. From the appearance of those wounds, witness would say that deceased came to his death by reason of them. Witness, upon a further examination, saw 3 other wounds upon deceased, making in all six.

Wm. H. Cravy. Witness was jailor of this county at the last term of this Court, and has been ever since. Prisoner has been in witness's custody since then, except a very short time; witness alluded to the time prisoner made his escape from jail. Prisoner, at the time of his escape, was in jail under charge of killing Green B. Lee. Prisoner was caught and brought back. Prisoner, with James Hogan and Simeon Lester, and two negroes, at the time of making his escape, was confined in the dungeon; all got out except Lester; witness carried prisoner provisions twice a day, from the time of his commitment to the time of his escape. Witness gave prisoner, during this time, such as he had at his own table—such as coffee, &c.; witness carried prisoner as good as he had himself; witness had coffee,

Mercer vs. The State.

bread and meat; sometimes flour bread, sometimes corn bread; if any flour bread was left, it was carried; if not, witness did not wait to have any more baked; witness does not know, but thinks he carried prisoner coffee every day until his escape; witness thinks prisoner broke out of jail some time in April or May, shortly after our last Superior Court; witness did not see prisoner when he went out of jail; witness does not know whether prisoner sought to do witness any injury or not in his effort to get away; witness had not been to jail the day prisoner broke out since morning; it was then about night, at the time prisoner went out of jail; witness had unlocked the jail; if prisoner offered to do witness any hurt he did not see or hear it; witness thinks that prisoner was the cause of witness going into the dungeon; When witness went to the dungeon, a negro who was confined within, asked witness to take a piece of money and get him some tobacco; witness paying no attention to it, the prisoner at the bar remarked that the negro had but a short time to live, and thought he ought to have all the luxuries he could procure, whereupon he went into the dungeon to get the money, supposing the negroes were chained.

Green D. Sims for defence: Witness was at Bumbletown on the morning after the killing of Green B. Lee. On that day, Sunday evening, witness had a conversation with Clem Clements in regard to the difficulty of the evening before. Clemens told witness that he was drunk, and did not know anything about it. When witness went to Bumbletown about 9 or 10 o'clock on Sunday morning prisoner was tied. Witness tried to rouse prisoner up but could not; witness considered prisoner at that time drunk.

Charles L. Matthys: Witness was at the place called Bumbletown, in this county, the day Green B. Lee was killed, at night; witness left there between sunset and dark; about dusk Clem Clements was, as witness thinks, drunk—the reason witness thinks Clements was drunk; witness, about the time he was leaving, called to Clements for some liquor; Clements was reeling on the counter his head lying over it and paid no attention.

Mercer v. The State.

then to it; witness noticed the prisoner sitting in the piazza late in the evening drunk; the last witness noticed Wiley King was between sunset and dark, or about sundown; at that time King was charging round there; witness thought King was going to get into a fight; King passed by witness and others with his sleeves rolled up, and remarked he was going to eat his supper off that crowd, or could do it that night, remarking that some 2 years before he had been cut to pieces there; witness thought King pretty drunk at that time.

Examined by the State: Witness had a conversation with W. W. Lee in the month of last December about this transaction at Col. Lee's house; in that conversation, witness told W. W. Lee that prisoner drank less the day of the killing than usual; witness knows of no difficulty which ever occurred between prisoner and deceased; witness drank some; was not drunk; went there sober and came away sober; had taken a drink or two in the course of the day; witness did not hear prisoner say that he killed deceased; Clem Clements is pretty deaf, but sometimes can hear very well, at other times he cannot.

Thomas Childer, witness sworn for the defendant, says: Witness went to Bumbletown some two or three hours by sun, on Sunday morning, after the killing of Green B. Lee; witness asked for Clem Clements when witness arrived, and was told he was at Mr. Harrison's; witness went over there; witness went into the house, and at the fireside witness found Mr. Clements; witness asked Mr. Clements to tell him about the murder scrape; Clements told witness he could not do it, for he was very drunk. Clem Clements did tell witness at Henry Harrison's, on the morning after the difficulty, that he, Clements, was so drunk that he knew nothing about the case. No one was present at Harrison's at the time the conversation alluded to above took place, except witness and Clements. Mr. Harrison's house has two rooms; Clements was in the North room; witness and Clements remained in conversation only for a short time; no one came in during the time that witness re-

Mercer vs. The State.

objection; witness was duly sober that morning—had not drank a drop up to that time.

Jno. Mercer. Witness was at Bumbletown the day Green B. Lee was killed, at night; left Bumbletown half an hour after dark; prisoner, at the time witness left, was drunker than witness had ever seen him before; witness went back to Bumbletown that night, and remained there all night; liquor was given prisoner that night; prisoner was as drunk, if not drunker, till next morning, as he was the over night.

Samuel S. Johnson. Witness was at Bumbletown the day that Green B. Lee was killed, at night. Witness left between sunset and dark; witness returned about 12 at night; witness lives better than 4 miles from Bumbletown; a negro of Col. Lee's came after witness; witness remained at Bumbletown the balance of the night; after witness returned, prisoner was drinking liquor during that night; witness would consider prisoner drunk next morning; witness did not notice Clem Clements particularly, at any time that evening. Witness and McGee were the officers who committed prisoner to jail; after witness returned to Bumbletown that night, after the killing, witness noticed that prisoner's clothes were very bloody; witness identifies the knife presented as the knife produced at the commitment trial, or one so much like it that witness would take it for the same; witness remembers it because of its being a white handle knife and having peculiar spots on the handle; the knife was bloody at that time—tis bloody now; witness saw prisoner with just such a knife the evening before deceased was killed; witness takes this to be the same knife prisoner had in the evening of the killing; witness came with prisoner to Fumkin; prisoner attempted to get away from them between this and John Ball's mill; he tried to escape about a mile from this place; prisoner got, at that time, some sixty or seventy yards from the road; Mr. Headrick overtook prisoner; prisoner jumped off his horse and ran on foot; witness thinks this occurred on Sunday evening after the killing; prisoner had been drinking, but was soberer than he had been; witness thinks, at that time, pris-

Mercer vs. The State.

over could beat witness running; prisoner's hands were tied at the time; witness met prisoner and the crowd bringing him to Lumpkin, between the 11 and 12 mile posts from town, and witness came on with them. At the commitment of prisoner, witness asked prisoner what he killed Green B. Lee for? Prisoner answered—he did not know, for he had nothing against him.

D. W. C. Thornton, witness for defendant, sworn, says: Witness was at Bumbletown the day of the muster, the day the difficulty occurred, at night; witness left there half or an hour by sun, in the evening; witness's impression, at the time was, that prisoner, at the time witness left, was drunk; witness was present and with the prisoner at the time deceased invited the Union Scott Whigs, in to "drink"; witness and prisoner were standing or sitting together, at the time, in talking distance, when deceased gave in the invitation mentioned; prisoner remarked to witness, "Do you hear that?" or can you stand that; and asked witness to go in and call out some Democratic liquor; witness told him no—and witness thinks prisoner remarked, if witness did not do it, he, prisoner, would; prisoner used no abusive language or made any threats, in witness's presence, against the deceased; witness thinks prisoner and witness remained together some ten or fifteen minutes, at that time.

Henry Harrison. Witness lives some two hundred and fifty or three hundred yards from Bumbletown; was at Bumbletown the night after the killing—the noise of the people that remained at Bumbletown and screams of Mrs. Lee, was what carried witness back to Bumbletown that night; witness saw Green B. Lee lying dead; prisoner was in the yard standing up; and witness found W. King guarding prisoner; witness did not think Wiley King drunk, thin, witness supposed, was a half or three-quarters of an hour after the killing; witness conversed with Wiley King and noticed him particularly, and witness did not look on him as a drunken man; witness saw and talked some few words with prisoner that night; witness did not look on prisoner as being very drunk, though the two

Major v. The State:

in liquor; witness saw and talked some with prisoner next morning; witness thought him about the same as the night before, did not regard him as being very drunk, but in liquor some; witness thought, from the conversation he had with prisoner, that prisoner had his ordinary faculties of memory and reason; witness thought prisoner talked like he knew what he was doing; witness has known prisoner some twenty years—knew him well; witness has known some little of prisoner's general character; when drinking, of late years, from witness's knowledge of prisoner, witness thinks prisoner was a little inclined to be a dangerous man when in liquor. Witness says that for the last four years prisoner has had the character of being a dangerous man when in liquor. When witness left Bumbletown and returned that night, witness looked on Clem Clements as being pretty far along in liquor—tolerable drunk. Witness talked with Clements; he seemed to be tolerable rational, talked as though he knew something of what was going on about.

After the Court had charged the Jury and they were about retiring, Counsel for prisoner asked the Court to charge the law as to confessions; whereupon, the Court instructed them that confessions were permitted by the Court, to go before the Jury, as any other evidence; and although the Court might allow them to go, to the Jury, yet, they should weigh them as they did other testimony; and the rule of law was, that any confession made under the influence of hope or fear, was no evidence, whatever, and they should disregard it entirely; but if they should believe that the prisoner made confessions without any such influence operating upon him, and did so freely and voluntarily, then such confessions was the highest kind of evidence against him;" and to which Counsel for the defendant did not then, but now excepts.

The cause being closed, the Jury returned the following verdict, to wit: We, the Jury, find the prisoner, Jacob Moret, guilty of wilful murder.

Whereupon, the defendant, by his Counsel, moved for a new trial, on the following ground, to wit:

Meyer vs. The State

1st. That the finding of the Jury was contrary to the evidence submitted in the case.

2d. That the finding of the Jury was contrary to the charge of the Court.

3d. That the finding of the Jury is contrary to the law.

4th. That one of the Jury who sat upon and tried said case, to-wit: Richard F. Bostwick, had formed and expressed an opinion as to the guilt of said defendant, and had said, previous to the trial of said case, that said defendant ought to and would be hung, as will fully appear by reference to the affidavits hereto annexed.

5th. That Richard F. Bostwick, one of the Jurors, was not willing to said verdict, but consented to it because the majority was against him, and he could do nothing from the fact of a majority of the Jury being against him, and that the questions propounded to the Jurors, when put upon their voir dire, was contrary to law.

The following affidavits were introduced in support of said motion for a new trial, to-wit:

GEORGIA—STEWART COUNTY:

Before me personally came Elisha Woodard, who being duly sworn, deposeth and saith on oath that some time since, about a month or two ago, he was in the grocery store of Richard F. Boatwick; that said Boatwick and some other persons were talking about the circumstances of the murder of Green Bee by Jacob Meyer; that said Boatwick replied (alluding to the circumstances of the murder as then stated) that said Meyer ought to be hung.

E. WOODARD.

Sworn to and subscribed before me, this Oct. 26th, 1854;

C. J. WALKER, J. L. C.

GEORGIA—STEWART COUNTY:

Before me personally came James Jones, who being duly sworn, deposeth and saith on oath, that after the impanelling of the Jury in the case of The State vs. Jacob Meeson, that he mentioned to Burwell R. Marquis, one of the State's attor-

CONSTITUTION, JANUARY TWENTY, 1855.

300

Mercer vs. The State.

says, that he had selected a bad Juror in the person of Richard F. Bostwick, for that he thought said Bostwick would never return a verdict of guilty; that said Harrison replied that he, Bostwick, would hang him, for he had heard him, Bostwick, say that he, Mercer, would, or ought to be hung.

JAMES JONES.

Sworn to and subscribed before me this October 26th, 1854.

C. J. WALKER, J. J. C.

GEORGIA—STEWART COUNTY:

Personally came Jacob Mercer, who being duly sworn, deposes and saith, that upon the trial of the case of The State vs. Jacob Mercer, that he had never heard of the expression of any opinion by Richard F. Bostwick, one of the Jury who tried said case, as to his guilt, or innocence, and that he did not know that said Richard F. Bostwick had said that deponent ought to and would be hung.

JACOB MERCER.

Sworn to and subscribed before me this October 26th, 1854.

C. J. WALKER, J. J. C.

The State's Counsel then introduced B. R. Harrison, Esq. one of the Attorneys for the State, and he testified that it was true he had heard R. F. Bostwick express opinions unfavorable to prisoner. The Solicitor General then introduced John A. Tucker, C. A. Evans and E. H. Beall, Esqrs. Attorneys for defendant, who each testified that they had never heard said Bostwick express any opinion as to the guilt or innocence of the prisoner.

The Solicitor then introduced Thomas H. Morton, one of the Jurors who tried the case, to prove that Richd. F. Bostwick was one of the last who agreed to the verdict; and said Morton testified that said Bostwick did not agree to the verdict at all, but until he could not do any thing, as they were all against him.

The defendant's Counsel then introduced the following witnesses:

Mercer vs. The State.

GEORGIA—STEWART COUNTY:

Before me, personally came Marion J. Jenkins, who being duly sworn, saith that this morning, (next after the trial of Jacob Mercer for murder) Richard Harrison, one of the Jurors who tried said case, told deponent that he did not believe Mercer ought to have been convicted, and that he, said Harrison, would not have agreed to the verdict but for the fact that they were all against him; and Richard F. Boatwick and they could not do any thing by themselves.

MARION J. JENKINS.

Sworn to, and subscribed before me this October 26th, 1854.

C. J. WALKER, J. L. C.

And the defendant's Counsel then introduced the statements of E. H. Beall, Calvin J. Walker and John A. Tucker, Attorneys in the case, who each stated in his place, that Richard Harrison had told them that he did not agree to the verdict, but suffered it to be so brought in, because he could not control the rest of the Jury.

When the Jury returned their verdict, they were polled, and each agreed to the verdict.

Upon these exceptions error is assigned:

J. JOHNSON, TUCKER & BEALL, for plaintiff in error.

RAMSEY, HARRISON and B. F. WORRILL, for defendant in error.

By the Court.—STARVES, J. delivering the opinion.

[1.] When the Jurors were called up in this case, they were asked by the Solicitor General, "if they had any conscientious scruples as to capital punishment;" this offence having been committed before the Act of the last General Assembly, authorizing such questions. No objection was made, at the time by the plaintiff's Counsel, and no question on the point was asked for, or made by the Court. He may have suggested, and

Mercer vs. The State.

he had the right to suppose, that the questions were put by an understanding between the counsel, and that all objections were waived. We think, therefore, that in this proceeding the Court committed no error by not interposing, supposing that the questions were not authorized by law to be put in this case.

But we are not sure of this. We rather incline to think that the provisions of this Act, merely regulating the form of trial as they do, apply to all trials taking place after the passage of the Act, whether the offence was committed before or not.

[2.] In the course of his charge, Judge CRAWFORD remarked, that confessions were the "highest kind of evidence;" and of this, complaint is made. It is insisted that confessions *may* not be the highest kind of evidence; that they may be made under such circumstances as tend to involve them in doubt or suspicion. And that the charge of the Court was calculated to lead the minds of the Jury away from the inquiry, whether or not any such circumstances existed in this case; whether or not the confessions of this prisoner may not have been made while he was in a state of mind and body, which lessened the value of his admissions, and rendered them not the highest kind of evidence.

That justice may be done to the charge on this head, we should look to the circumstances under which it was given. The charge had been concluded, and the Jury were about to retire when the Counsel for prisoner arose and asked the Court to "charge the Jury as to confessions." Thereupon, the Court instructed the Jury, that "confessions were permitted to go before the Jury, and although permitted so to go, yet they should weigh them as they did other testimony; and the rule of law was, that any confession made under the influence of hope or fear, was no evidence whatever, and they should disuse, and it entirely; but if they should believe that the prisoner made confessions without any such influence upon him, and did so

Mercer *vs.* The State.

freely and voluntarily, then such confessions were the highest kind of evidence against him."

It will be observed that the Court was thus requested, in general terms, to charge the Jury "as to confessions," and gave in charge the general and elementary principles which govern the subject. In a general point of view, all that was charged was correct, and if there were any special circumstances in the evidence, which took this case out of the general rule, to these the attention of the Court should have been called. In the absence of this, and looking to the *generality* of the request, the Court may have rightly presumed that only the general instruction was desired. But [perhaps it may be said, that if the charge be examined closely, enough was contained in it to direct the attention of the Jury to any circumstances which might lessen the value of the confessions as evidence; for we find the Court, while telling the Jury, that if the confessions, &c. were freely and voluntarily given, they were the highest kind of evidence; at the same time saying, that they should be weighed by them as any other testimony.]

After verdict in this case, a motion was made for a new trial, and over-ruled by the Court on all the grounds taken. And this decision is before us, alleged to be erroneous, because —1. The verdict was contrary to the evidence. 2. To the charge of the Court. 3. Because it was contrary to law.

[3.] A very forcible criticism has been made upon the character of this testimony, and we have felt the weight of it. It is alleged that most, if not all the witnesses who were present at this homicide, were in a state of beastly intoxication, and very unfit, properly to take cognizance of, or to report what transpired.

This is partly true. But though true, there are several circumstances not depending on the statements of the drunken witnesses, (we speak not now of the admissions made by the prisoner,) which authorize a strong suspicion that the deceased came to his death at the hands of the prisoner. Yet these were not entirely satisfactory; and hence, during a part of the considerable time which we have had this case under advisement,

Mercer vs. The State.

we have hesitated to say that this prisoner should be deprived of his life upon such testimony. Not that it was *all* the testimony of drunken witnesses; but that a *very large portion* of that which was material, was so. And not that we were prepared to say, that any other verdict could have been rendered on this evidence; but that we felt, as Judges, that the responsibility of depriving our fellow-man of life, upon such testimony, was *very great*; and that in consideration of the circumstances, as no witness had seen the mortal blows given, and the evidence, upon which reliance was chiefly had, as we thought, for a conviction, was circumstantial, the sentence might have been commuted to perpetual imprisonment in the penitentiary. And a majority of this Court were inclined to send the case back with instructions to this effect.

Upon looking more narrowly into the testimony, however, we have become satisfied, that there is evidence of the prisoner's guilt, which is not circumstantial—evidence consisting of confessions made by him, and deposed to, in part, by witnesses who were not intoxicated, and whose testimony is not impeached.

We find James H. Jackson saying, that the father of Green B. Lee (the decedent) came up, after the homicide had been committed, and said, that the prisoner had killed his son, "and should hang," when "prisoner spoke very low, and said, he had done nothing more than he wanted to do, and he did not care if they hung him, or what they did with him."

Mrs. Mary Ellis, a witness who was not one of those who were said to have been more or less intoxicated, says that she went to the place where the homicide was committed, on the night decedent was killed, with Mrs. Mercer (prisoner's wife) and her children—"heard prisoner say he did kill Green B. Lee, and would do it if it was to do again."

Samuel Wright said, that "on the morning after the killing of Green B. Lee, was at B—asked prisoner how he felt. Prisoner answered he would feel better if he had some coffee. W. then asked prisoner how he felt about the scrimmage or fracas of the over night, or what he had done: his answer was,

Mercer vs. The State.

'Sam, I have done nothing more than I expected I would do four years ago.'

Charles T. Connally (a witness of whose high character for respectability the eloquent Counsel for the prisoner speaks) says, that he "was called twice by prisoner to come to him. He then went. As he was approaching, prisoner says, 'Connally, I am in strings'. Witness replied, 'I see you are; I am sorry for it'. Witness then asked, 'how came you to kill Lee, or what caused you to do it?'" [Did the prisoner deny it, or prevaricate, or speak doubtfully, like one who had committed the act in a dream of madness? Let us see.] "His reply was, 'I can't tell you now what caused me to do it.'" [We might conjecture that this arose from his not recollecting. But mark what follows:] "I then asked if they were in a row or difficulty that caused him to kill him. Prisoner replied, 'no; there had not a word passed between us.' He then went on to remark—'It is done as you see it there,' (this was next morning, in view of the decedent) 'but I cannot tell you, now, what caused me to do it. *I will acknowledge the whole truth to the Court.*'"

Samuel J. Johnson, a witness for the defendant, swears that "at commitment trial, he asked prisoner what he killed Green B. Lee for. Prisoner answered he did not know, for he had nothing against him."

In view of these confessions, and taking them in connection with all the other testimony, we have felt constrained to say that the verdict of the Jury was supported by the evidence; and that we see no reason, because of the intoxicated condition in which some of the witnesses were, to disturb the judgment in this case.

[4.] It was argued that the verdict was contrary to law, because that this prisoner was overcome with liquor, until (as it was insisted the testimony shows) he knew not what he was doing, if he did take the life of the decedent; that he had no malice against him (who was his brother-in-law) but that he struck the mortal blows in irresponsible madness.

To this appeal, we oppose the law of the land—the law which

Mercer vs. The State.

declares, that voluntary drunkenness "shall not be an excuse for any crime." To it we oppose more than this; we present reason, plain policy, and the facts of this sad case. Let us glance at these facts for a moment.

On the 12th day of November, 1858, there was a militia muster at a place called Bumbletown, in Stewart County. Many persons were assembled, and among them one or more candidates for public office. Out of this circumstance, perhaps, grew some electioneering and political excitement after the muster. Not a little strong drink, too, was consumed upon the occasion, and the decedent, who seems to have been a leading man at the place, called upon his party friends to drink with him; when the prisoner, who thought the brother-in-law of the decedent, was opposed to him in politics, expressed some exasperation, and proposed that a candidate of the opposite party who was present, should also call for drink. As night approached, most of the company dispersed; but some remained, apparently for the purpose of prolonging the debauch at one of those sinks of iniquity and sources of crime—a grog-shop—for that particular place made and provided. Here these persons, among them the decedent and the prisoner, assembled, and all continued to ply themselves with the vile drink there retailed—or drink as "thick and slab" with poisonous and inflaming ingredients, (according to the description given by the Counsel for the prisoner,) as was ever the disgusting liquid in a witch's cauldron; until every man, including even the dispenser of the mischief-working fluid, (fit minister for such an altar) the keeper of the shop himself, had become more or less intoxicated. Then it was, when the night had considerably advanced, that a quarrel arose, (as is of course, always to be expected on such occasions,) between some of those present. The decedent still giving vent to something like political excitement, knocked down one of the company, of whom he spoke as obnoxious to him from this cause, and thrust him from the house. The next thing stated is, that the prisoner, (very probably espousing the cause of his political friend,) is seen in contact with the decedent, with a bloody knife in his hands—his face and

Merer vs. The State.

hands dripping with blood ; and presently afterwards, the decedent is found dead, covered with several ghastly wounds. Subsequently, the prisoner throws his knife into the bushes, according to the evidence. It is found and identified as a knife which he had previously owned. And afterwards, he confesses to several persons that he had taken the life of the decedent.

We shall not continue this reference to the testimony. Our only object has been, by this slight *resume* to show, that going upon the supposition that the decedent was slain by the prisoner, there is nothing in the evidence, (such as is contended for by his Counsel) the effect of which is to show an excuse in his drunken madness. He voluntarily placed himself in this situation, even if he were thus drunk, and if he continued to inflame himself with liquor until he had reached such a pitch of fiendish phrenzy, that without any cause which can be assigned, unless it be mere political excitement, he could imbrue his hands in his brother's blood, there can be no excuse for such voluntary madness—there can and should be no excuse for it; because it shows a heart fatally bent on mischief; and desperately at enmity with mankind. If it should be excused, what good and peaceable citizen is safe who may chance to come in contact with the reckless ruffian in his cups, or the drunken debauchee fresh from his midnight revel?

There is, in the evidence, a statement by an unimpeached witness, (Henry Harrison) who says that he has known prisoner for twenty years, and that for "the last four years he has had the character of being a dangerous man when in liquor." If this be so; there is the more reason why he should be held responsible for such an act, committed in a state of voluntary drunkenness.

[5.] One of the assignments of error in this case is, that the Court refused a new trial on the ground that Richard F. Bestwick, a Juror who tried this prisoner, had before the trial formed and expressed an opinion as to the guilt of the prisoner, viz: had said that "he ought to be, and would be hung."

The record shows, that the "said Bestwick and some other

Shockley *vs.* Davis *et al.*

persons were talking about the circumstances of the murder," &c. that a statement was made in relation thereto by some one present, and "that said Bostwick replied, if such were so, that said Mercer ought "to be hung." Bostick was not put upon his *voir dire*. And as the Court below decided, the statement showed that he had no fixed opinion on the subject, or prejudice against the prisoner, but the remark was a mere loose observation founded on the unsworn statement then made in his presence; and indeed, was cautiously guarded, for he said, "if that were so," &c. The presumption is, from the record, that such an impression would have yielded to evidence delivered under oath, and that triors would so have found, had he been put upon triors.

[6.] It is also urged that the Court should have granted a new trial, because Richard Harrison, one of the Jury who tried the prisoner, had informed several persons, whose statements appear in the record, that "he did not agree to the verdict, but suffered it to be brought in, because he could not control the rest of the Jury."

In the first place, this assertion of the Juror is not sustained by the record. That shows, he did agree to the verdict, in the way which is known to the law. In the next place, a Juror cannot be allowed, in this way, to impeach his verdict. The practice is too plainly improper and dangerous, to need any further comment from us.

It is our solemn duty to affirm this judgment.

No. 82.— WILLIAM D. SHOCKLEY, plaintiff in error, *vs.* G. A. DAVIS and others, defendants in error.

[1.] In attachment, the bond, though, for a sum greater than double the amount sworn to be due, is good.

Shockley vs. Davis et al.

Attachment, in Marion Superior Court. Decision by Judge PERKINS, August Term, 1854.

The only question in this case is—whether an attachment bond, given under the Act of 1833, is good, which is for more than double the amount of the debt sworn to. The Court below held the attachment to be good, and this decision is assigned as error.

OLIVER, for plaintiff in error.

PRYOR, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The Act of 1833, to amend and explain the second section of the Attachment Act, of the 18th of February, 1799, requires, in attachments, the plaintiff to give the defendant bond and security, in a sum *at least* equal to double the amount sworn to be due.

The meaning of this requisition is, that no bond, for a sum less than double the amount sworn to be due, shall be received; but that any bond for a sum *equal* to double that amount, or for a sum *greater* than double that amount, shall be received.

This is clear, both from the words of this Act, and from the words of the part of the Act of 1799, which this Act was passed to amend. Those words are—"shall take bond and security of the party for whom the same may be granted, in double the sum to be attached"—not in *at least* double the sum to be attached.

In this case the bond was for a sum *equal* to more than double the amount sworn to be due.

The Court was right, therefore, in holding the bond good.

Shockley *vs.* Davis *et al.*

No. 33.—WILLIAM D. SHOCKLEY, plaintiff in error, *vs.* G. O. DAVIS and others, defendants in error.

[1.] Where A agrees with B that in consideration that B will become his surety to C, he, A, will turn over choses in action for his indemnity: Held, that A being in failing circumstances, a Court of Equity will decree a specific performance of the contract.

In Equity, in Marion Superior Court. Decision by Judge CRAWFORD, August Term, 1854.

G. O. Davis and others became the sureties of Wm. D. Shockley on two promissory notes, amounting to \$1200, upon the agreement and promise of Shockley to turn over and transfer to them his books of account and other evidence of debt, to secure them from loss by reason of their suretyship. These books, &c. were partnership assets of Shockley & Wooding. Davis and his co-sureties filed their bill, alleging that Shockley had refused to comply with his agreement; that he was in failing circumstances, and that suit was pending against them on the notes. The prayer was for a specific performance:

The over-ruling of a demurrer to this bill is the error assigned in this case.

OLIVER and S. HALL, for plaintiff in error.

PRYOR, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Can this bill be sustained, filed as it is to enforce the specific performance of an agreement, to turn over choses in action to indemnify the complainants against their suretyship for the defendant?

It is demurred to on several grounds. It is denied that a Court of Equity has jurisdiction over a bill for the specific performance of a contract, relating to chattels. And ordinarily,

Shockley *vs.* Davis *et al.*

it has not, for the reason that adequate compensation, it was supposed, could be recovered at Law, for the breach of such a contract. All parties are entitled to a compliance with their contracts. And it is no good excuse, that they may recover damages at Law for their breach. Instead of the party's having the benefit of his own agreement, the objection upon principle to this whole doctrine is, that it allows a Court and Jury to substitute so much money as they may think sufficient to indemnify the party against the injury he has sustained. Remedial justice will be incomplete, until this defect in the law is cured; and until it shall be established, that all parties shall be entitled to have their contracts executed, if it be practicable, due regard being had to the rights of third persons which have intervened.

But whatever imperfection may exist in this respect, there is no want of power in the Courts to maintain this bill, provided it was properly framed. The bill is not brought to enforce a contract of sale respecting chattels, but to compel the defendant to execute the indemnity which he promised to the complainants, to induce them to become his sureties. No satisfaction could be made for the failure to perform such an undertaking, especially by a defendant who is, as alleged by the bill, "in sinking circumstances," and against whom judgments may be previously obtained by others. In which event, the remedy at Law would prove to be wholly unavailing.

Nor is it any answer against the equity jurisdiction, that the complainant may attach or obtain a *ne exeat*. Did the complainants go into Court upon general principles of Equity, it would be competent to show that they had an adequate and ample Common Law remedy. But not so when they pray the specific performance of a contract.

This bill, however, is deficient in two particulars. First: In not stating what books of account or evidences of debt were to be turned over. If the complainants were unable to specify those *books in action* with minuteness, for want of access to them, they should have charged this fact, by way of excuse for their want of particularity, and have called upon the defendant

Johnson, &c. vs. The Governor, &c.

to supply the deficiency. The charge, in this respect, is too vague. The decree cannot be more definite than the bill—and if rendered, could not be enforced for uncertainty. Suppose a decree were rendered in conformity to the prayer of the bill, that the defendant turn over to the complainant his books of account and other evidences of debt, and an attachment were moved against him for not complying with the decree, could a Court determine whether he had or had not?

But again, the notes for which the complainants became surety are, upon their face, the individual debts of Wm. D. Shockley. *Prima facie*, he had no right to pledge the partnership effects for their payment, or to secure those who were bound for him. True, the bill shows that these notes were given for the partnership debt of Shockley & Wooding, to P. McLaren & Co.; still, it should have been distinctly averred that these notes, although made by Shockley alone, were nevertheless the notes of the firm.

If the bill be amended in these particulars and supported by satisfactory proof, the complainants will be entitled to the redress which they seek.

No. 34.—JOHN JOHNSON, Ordinary &c. of Muscogee County, plaintiff in error, vs. THE GOVERNOR, *ex rel.*, FRANCIS J. ABBOTT and others, defendants in error.

[1.] An Act to authorize and require the Treasurer of the Poor School Fund, in the County of Muscogee, to pay, before any other claims, over to certain teachers of poor children in said County, for the years 1851 and 1852, out of the poor school fund thereof, the full amount of their accounts, and all arrearages due them for teaching poor children in said years, out of any funds now in hand, or out of the first that may be received, approved January 10th, 1854: Held, not to impair the obligation of any legal contract, and therefore is not unconstitutional.

Johnson, &c. vs. The Governor, &c.

[2.] The Act of 1852, making the Ordinary a Commissioner for the poor school fund, does not require, that if there be not enough funds in hand, at the end of each year, to pay the teachers in full, the balances due them are to be postponed until the teachers of ensuing years are paid out of the funds of the year in which their services are rendered. But the amount of each teacher's account for the current year, fixed according to the rates prescribed in that Act, after all older and just claims have been paid, is to be paid *in full*, if there be enough to pay in full; if not, *ratably*: and the balances due stand in order to be paid out of the taxation of the next year, before the accounts of teachers for services rendered in that year.

[3.] The claims of the teachers of 1851 and 1852, in Muscogee County, on which only a ratable proportion has been paid, have not been satisfied in full, because there were not funds enough raised, by taxation, during these years, to pay them; but the unpaid balances are just and valid claims against the State, which may be justly paid as directed by the Legislature in the Act of 1854, out of any funds now in the hands of the Treasurer, or the first which may be received by him.

Mandamus, in Muscogee Superior Court. Decision by Judge WORRILL, June adjourned Term, 1854.

The General Assembly of 1853-4, passed an Act authorizing and requiring the Treasurer of the Poor School Fund of Muscogee County, to pay to each and all teachers of poor children, for the years 1851 and 1852, out of the poor school fund, the *full amount* of their accounts, and all arrearages due them; out of any funds in hand or the first that may be received.

Francis Abbott, a teacher of poor children for the year 1853, prayed a mandamus against Johnson, the Ordinary and *ex officio* Commissioner of poor school fund, requiring him to show cause why he did not pay over to him the amount of his account from the fund of 1853. Johnson returned to the mandamus these facts: That he had in hand from the poor school tax, recommended and assessed for 1853, and from the State poor school fund, sufficient to pay the teachers for 1853, *six cents per day* for each scholar. But that under the before-mentioned Act of 1853-4, the teachers for 1851 and 1852, claimed to be paid out of this fund; that the failure of the Spring Term of the Superior Court of Muscogee, for 1852, rendered it impossible to lay a poor school tax for that year; and hence, the failure to pay the teachers for that year. He prayed the

Johnson, &c. vs. The Governor, &c.

direction of the Court as to his duty in the premises, and especially as to the mode of auditing the accounts. The Court directed the fund to be paid to the teachers for the year 1853. This decision is assigned as error.

INGRAM and CRAWFORD, for plaintiff in error.

W. WILLIAMS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

This is a contest between teachers of poor children in the County of Muscogee, for the years 1851, 1852 and 1853, in relation to a fund in the hands of the Ordinary, raised by taxation of the year 1853.

We think that it is to be inferred from the record before us, that the teachers of 1851 and 1852, have not been paid the amount of their claims upon the county, in full. That record shows that the accounts of the teachers of 1851 were audited by the Inferior Court, and paid according to the order of that Court, by the County Treasurer—some of them at the rate of 44 cents a scholar, per day, and certain of them receiving specific amounts. The balance due on claims of these persons, is not shown; but it appears that such a balance exists.

By reason that the Superior Court did not hold a session, in Muscogee County, in the Spring of 1852, and of the consequent failure on the part of the Grand Jury to make the necessary recommendation, the proper fund was not raised for that year; and the teachers of the year have been paid 1 cent and 6 mills a scholar, per day, only; and there is, therefore, a balance not paid to them for their services during that year.

Before January, 1852; this subject was regulated by the provisions of the Act of 1848; and payments were made by the commissioners according to the amount of the poor school fund in hand, and on such terms as were determined by the commissioners. But the law seems not to have fixed any rates of charges by which such teachers were to be regulated.

Johnson, &c. vs. The Governor, &c.

The Statute of 1852 gives this whole matter into the care of the Ordinary, as commissioner, and fixes a rate of charges, viz: *the rates shall not exceed the amounts usually charged by the teacher, nor such maximum as may be established by the Ordinary in each county.*

Two objections are suggested by the relator, as lying in the way of carrying this Act of 1854 into effect—and one seems to have occurred to the Ordinary.

1. It is said that the Act is contrary to the 10th section of the 1st Art. in the Constitution of the U. States as impairing the obligation of a contract. 2. It is said that the accounts of 1851 and 1852, have been paid in full.

[1.] The first objection is not tenable, because there is no such contract as is supposed. No pledge has been made by the State, upon the faith of which these teachers have acted, that they were to be paid out of the taxation of 1853. The Ordinary may have put this construction upon the Act of 1852, and he may have made agreements with certain of these teachers, that for their services, they shall be paid out of the fund of that year; and the effect of this Act of 1854 may be to defeat such stipulations. But if the State has pledged itself to no such stipulation, the Ordinary had no authority to bind the State to any such agreement, and no contract to this effect binding on the State has been made.

The Act of 1852 declares, that the Ordinary "shall pay teachers of poor children in the following manner, that is to say: he shall keep on file every such account for the tuition of children on the list for each year, as shall be rendered to him, on or before the 25th day of December, in that year, proven by the oath of the teacher, specifying the number of days each child was taught, not exceeding the usual rates of such teacher, nor exceeding such maximum as may be established by the Ordinary in each county; and after the 25th day of December, he shall proceed to pay all such accounts in full, if the funds in hand be sufficient, or ratably, if insufficient, and always keeping as a fund for the next year, any surplus which may be left".

Johnson, &c. vs. The Governor, &c.

[2.] Now we think that a proper construction of these provisions does not make it necessary for us to say, that if there be not enough funds in hand at the end of each year to pay the accounts of the teachers for each year in full, the balances due then, are to be postponed until the teachers of ensuing years are paid out of the funds of the year in which their services are rendered.. This might be to postpone the payment of such balances forever. But our construction of this Act is, that the amount of each teacher's account is to be fixed in the way prescribed; that out of the fund in the Ordinary's hands, after all older and just claims have been paid, the teachers for the current year shall be paid—in full, if there be enough to pay them in full, if not *ratably*; and the balances due shall stand in order to be paid out of the taxation of the next year, before the accounts of teachers for services rendered in that year. And so on from year to year—the first services will be first paid. This is certainly the just and equitable rule. In all similar cases of claims, *the first in point of time, is superior in Equity*. And we know not why this poor laborer should not be as worthy of his hire, as others, and equally entitled to have the benefit of the principles of justice.

In this view of the matter, if the Ordinary has contracted with the teachers of 1853, and agreed to pay them out of the fund of that year, if there be sufficient in his hands for this purpose, and in preference to older claims, he has transcended his authority, and the act is not binding on the Legislature. And not being so, in the same spirit of equity and justice to which we have referred, the Legislature had the right to say, as they have said, by the Act of 1854, that the oldest accounts shall be first paid.

[3.] The relator insists also, that the accounts of these teachers for the years 1851 and 1852, have been paid and satisfied in full.

We believe it is not denied, that they have been paid a *ratable* proportion, only, of what they were entitled to charge; and it is insisted that they have been paid in full, only because, according to the construction which the relator placed upon the

Johnson, &c. vs. The Governor, &c.

law, each set of teachers for a particular year were required to be paid out of the fund raised for that year. And the fund for these two years being exhausted, by the payments which had been made, there was nothing left out of which these teachers might be paid.

Such is not the construction which we place upon the law. The whole debt was due the teachers. Only a ratable proportion was paid. The debt was due by the State. The State owns all the funds raised by taxation, out of which poor teachers are to be paid, and if the Legislature, by the Act of 1852, has not authorized the Ordinary to pay the teachers of each year, first out of the funds raised in that year; (and we have shown, that it has not done so) then it had the perfect right, and it was its duty, to direct that payment should be made out of such fund in the hands of the Ordinary, to its creditors, these teachers.

As to the difficulty suggested by the Ordinary, that the Act of 1854 does not provide a rate of payment or measure of value, by which the teachers of 1851 and 1852 are to be paid, we remark, that the Act of 1852 provides the rule which we have already stated, that such teachers shall be paid according to rates which do not exceed the amounts usually charged by the teacher, nor such maximum as may be established by the Ordinary in each county. And as the act of 1854, under consideration, is in *pari materia* with that of 1852, it is fair to presume, that the rule provided by the latter was in the Legislative mind, because it is a reasonable and just rule; and hence, the Ordinary may adopt it, in our opinion, in settling with the teachers of 1851, under the directions of the Act of 1854.

Judgment reversed.

McDougald, adm'x, &c. vs. O'Reilly, assignee, &c.

No. 35.—ANN E. McDougald, adm'x; &c. of Daniel Mc Dougald, plaintiff in error, vs. EDWARD CAREY, assignee, &c. defendant in error.

[1.] Where, in the record of a case of *sci. fa.* to make parties, no order by the Court appeared, and there was no record of a suggestion before the Clerk, and order by him: *Held*, inasmuch as the Statutes do not require this, and there is some doubt as to the signification of the 65th rule of Court, a different construction of said rule having prevailed: inasmuch as the filing of said order was only necessary to the symmetry of the record, and not to the substantial justice of the case, and an amendment might have been made *nunc pro tunc*; and as the Court is not well satisfied as to the proper construction of this rule; that it will not disturb a settled practice, which has dispensed with the filing of said suggestion and order.

Scire facias, in Muscogee Superior Court. Decision by Judge WORRILL, June Term, 1854:

This was a *scire facias* to make Ann E. McDougald, adm'x of Daniel McDougald, a party to a cause pending at his death. The death of defendant, Daniel McDougald, was suggested of record, at July Term, 1853, but no order for *sci. fa.* to issue. Counsel for Mrs. McDougald moved to quash the *sci. fa.* on this ground, and because they insisted the cause was discontinued and abated. The Court refused the motion, and this is the error assigned:

Judge BENNING having been of Counsel in this case, did not preside.

JOHNSON & PATTERSON, for plaintiff in error.

DOUGHERTY, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] For the plaintiff in error, it is argued, that every *order*
 ver. xvii-24

McDougle, adm'r, &c. vs. Carey, assignee, &c.

facias issued for the purpose of making parties, should be found upon an intelligible record. That accordingly, when the defendant in this case died, an order by the Court, directing *scire facias* to issue, should have been placed upon the minutes; or if not, a suggestion and order should have been made in writing, before the Clerk, and filed among the proceedings in the cause. That without such order, the record lacks symmetry, and is unintelligible.

We agree with the Counsel for the plaintiff in error, that such an order of file is needed, that the record in such a case may be rendered easily intelligible. But we incline to think, that by the Statutes regulating the issuing of *scire facias*, this may be done by the Clerk without the granting or filing of this order.

It is said that if our legislation is lacking in this regard, the 65th Common Law Rule of Court prescribes this requirement. To this it is replied, that the provisions of this section apply only to cases of *scire facias* to revive judgment. There is something in the language employed, to encourage this conclusion. Yet we believe the uniform construction has always been, in our State, that this section applied to cases of *scire facias* to make parties. The practice, however, we think, has not been to enter a formal order directing *scire facias* to issue; but after the suggestion, it has usually been issued as matter of course.

However all this may be, we are not of the opinion that the absence of such order, in this case, was a fatal defect; for whether the question is controlled by the Statute or the rule of Court, the order might have been put of file by way of amendment, *nunc pro tunc*. In either point of view, it issues as matter of course; and the filing of the same is merely for the symmetry and completion of the record. Considering then, that no substantial justice is to be effected by sending back the case, and somewhat doubtful, as we are, as to the proper construction to be placed upon this rule of Court, we hesitate to disturb a settled practice, by interfering with the judgment of the Court below.

Kellogg & Co. vs. Buckler & Short and Mayo.

No. 36.—EDWARD KELLOGG & Co. plaintiffs in error, vs. BUCKLER & SHORT, defendants in error. THE SAME vs. GEORGE B. MAYO, defendant in error.

- [1.] A judgment does not become dormant, if there is an execution issued from it within two years from its date, and if entries by the Sheriff, on the execution, follow one another at intervals of less than seven years.
- [2.] A *f. fa.* which exists by virtue of a special order of the Court, as an order which, though it calls the *f. fa.*, an *alias*, says that the *f. fa.* is to stand in lieu of a lost original is not an *alias f. fa.* but is an established copy, or *a lost original f. fa.*
- [3.] It is illegal for the Sheriff to sell under a *f. fa.* property on which he has not levied the *f. fa.*.
- [4.] The Sheriff is not subject to be ruled out of his county.

Illegality, in Muscogee Superior Court. Decision by Judge MORRILL, at June Adjudicated Terms, 1854.

In 1838, a *f. fa.* was issued from Muscogee Superior Court, in favor of Edward Kellogg & Co., against Buckler & Short. It was levied 29th January, 1839, which levy was sold March 1st, 1839. In Sept. 1847, Wm. H. Gilmore, Sheriff of Lee County, levied the *f. fa.*. In June, 1853, G. B. Mayo, then Sheriff of Lee County, offered this levy for sale. In this meantime, the original *f. fa.* being lost, at May Term, 1848, of Muscogee Superior Court, an order was passed that the Clerk issue an *alias f. fa.* in lieu of the lost original. Short, one of the defendants, interposed an affidavit of illegality to the sale by Mayo, Sheriff of Lee—

1st. Because the judgment on which the *f. fa.* issued, is dormant.

2d. Because the *alias f. fa.* was illegally issued.

3d. Because the levy, so advertised by Mayo, was, as appeared by said *f. fa.* ordered to be dismissed, and no sale can be had under the same.

On the trial of this illegality, sundry orders and entries in the minutes were given in evidence as follows:

Kellogg & Co. vs. Buckler & Short and Mayo.

1st. The order at May Term, 1848, ordering an *alias fi. fa.* to issue.

2d. An order June 3d, 1848, ordering the levy in Lee to be entered on the *alias fi. fa.*

3d. At December Term, 1848, a motion made by Short to set aside the *alias fi. fa.*—1st. Because established without notice to defendant. 2d. Because the judgment was dormant; and 3d. Because it was paid off.

4th. An order at June Term, 1849, making the entries on the *fi. fa.* by *consent*, a part of the record.

5th. An order at May Term, 1851, stating, that it appearing that the *fi. fa.* had been levied, after which a *ca. sa.* had been issued, and Short arrested under the *ca. sa.* and it not appearing that any disposition had been made of said arrest: *Ordered*, that the levy be dismissed and the *fi. fa.* be notified to office. This order was entered on the *fi. fa.*.

6th. A *ca. sa.* issued 6th day of November, 1840, on this judgment, with this entry on the back of *ca. sa.* (Copied from executions.) Received, Columbus, May 3d, 1839, \$495³³, in part of this *fi. fa.* proceeds of the above stated sale, from Joseph D. Bethune, Esq. Sheriff, and Tax and Jury fee, \$5 00.

PHILIP T. SCHLEY, Atty for plffs.

With an arrest of Short on the *ca. sa.* 7th Nov. 1840, by the Deputy Sheriff—Short's bond to appear and take the Honest Debtor's Oath, and an entry, by the Sheriff, of "Discharged by order of plaintiff's Attorney, without having paid the amount due 14th June, 1851."

7th. June 18th, 1851, a motion by Short's Counsel, to enter on minutes, *nunc pro tunc*, an entry from Bench Docket, opposite the *ca. sa.* and Sheriff's return of "non-suit at October Term, 1841," with an issue made up thereon by the Counsel for plaintiff.

With this evidence before the Court, Counsel for plaintiffs moved to dismiss the illegality. The Court refused the motion and sustained the illegality, and this decision is assynd as error.

At the same term of Muscogee Superior Court, Counsel for

Kellogg & Co. v. Buckler & Short and Mayo.

Kellogg & Co. moved a rule against Green B. Mayo, Sheriff of Lee County, to show cause why he should not pay over the money due on said *fi. fa.* Mayo showed for cause the foregoing state of facts; and farther, that he was not subject to rule in Muscogee County. The Court refused to grant the rule absolute, and this decision is assigned as error. Both cases were heard together in the Supreme Court.

JOHNSON & PATTERSON, for plaintiffs in error.

H. Holt, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

In the first of these two cases, the sole question is, whether the Court below was right in refusing to dismiss the illegality proceeding:

The first ground assigned in the illegality proceeding was, that the judgment had become dormant.

The Act of 1822, commonly called the Dormant Judgment Act, declares that "all judgments" "on which no execution shall be sued out, or which execution, if sued out, no return shall be made by the proper officer for executing and returning the same, within seven years from the date of the judgment, shall be void and of no effect."

In this case, the judgment was obtained in 1838. In the same year, or early in the next, a *fi. fa.* was issued from the judgment. In 1839 this *fi. fa.* was levied; and soon afterwards, in the same year, the property levied on was sold. All this was entered, by the Sheriff, on the *fi. fa.*.

On the 6th of November, 1840, a *ca. sa.* was issued from the judgment. On the 7th of November, 1840, Short, one of the defendants, was arrested under the *ca. sa.* and he gave bond for his appearance to take the benefit of the Honest Debtor's Act.

All this was entered on the *ca. sa.* by the Sheriff's deputy, without making the arrest.

Kellogg & Co. vs. Backer & Short and Mayo.

In September, 1847, the *f. fa.* was again levied—this time, by Gilmore, the Sheriff of Lee.. And the levy was entered, by him, as Sheriff, on the *f. fa.*.

In 1858, Mayo, who had then become the Sheriff of Lee, offered the property thus levied on for sale; and to prevent him from selling the property, Short interposed the affidavit of illegality; to, dismiss which, the motion aforesaid was made. The Sheriff properly returned this affidavit.

It thus appears, that the judgment, at the time when this affidavit was put in, had not become dormant; for it appears, first, that within less than two years from the date of the judgment, an execution was sued out from the judgment, and was levied on property of the defendants or of one of them, that this property was sold by the Sheriff, and that an entry of his levy and sale was made by him on the *f. fa.* Secondly, that there was no interval of as much as seven years between any entry and the next following entry—the longest interval between any two such entries being that between the sheriff of arrest on the case, which was dated 7th November, 1849, and that of the entry of the levy on the *f. fa.* by Gilmore, which was dated in September, 1847, and that being less than seven years.

[1.] So it appears that the judgment had not become dormant.

The next ground assigned for the illegality proceeding, was, that the *f. fa.* was an *alias f. fa.*

It is true, that in such a case as this was, that of a lost *f. fa.*—the law, as held by this Court, requires the substitute to be not an *alias f. fa.* but an established copy of the original *f. fa.* (11 Ga. 642.)

But we regard this *f. fa.* as intended to be an established copy. For although it is called, in some, of the proceedings in the case, an *alias f. fa.* and although it is dated of a day subsequent to the day of the date of the one lost, and is signed by the person who was then Clerk, yet, it is, upon its face, not an *alias*, because it does say—"we command you, or before we have commanded you," &c. and because it is not the *face*

Kellogg & Co. v. Buckler & Short and Mayo.

ministerial act of the Clerk, as an *alias* is, but is a special act of the Court or the result of such an act; viz: of an order of the Court in the following words—"It appearing to the Court that a *fieri facias* of which the above and foregoing is a copy and the entries thereon which has been lost or mislaid, so that the same is beyond the control of the plaintiffs: whereupon, it is ordered by the Court, that the Clerk do issue an *alias fieri facias* in lieu of said lost original," and such an act or order of the Court, was the very sort of one which it would have been necessary to use for the establishment of a copy of the lost *fieri facias* if the intention had been to establish such a copy.

Besides, the order carries upon its face marks of a design to establish a copy. Why else is the *fieri facias* that is to be issued ordered to stand in *lieu* of the lost original? An *alias* stands in *lieu* of nothing; it is, itself, an original.

[2.] It appears, then, to this Court, that the *fieri facias* was intended to be an established copy and not an *alias*.

And considering it as an established copy, the defects about it do not render it void—they are such as are amendable. "So; where a *fieri facias* is improperly tested, or made returnable on a particular, instead of a general return day, or on a day out of term, or in the common pleas 'before us,' instead of 'our Justices at Westminster,' it may be amended by the award of execution on the roll." (2 *Tidd's Practice*.)

The third ground taken in the affidavit of illegality was, that the levy which Mayo, the Sheriff, was about to execute by sale, was one which had been dismissed by the order of the Court.

[3.] And this was a good ground. The *fieri facias* does not authorize a Sheriff to sell the defendant's property, without having levied on it. (*Cobb's Dig.* 509, 510.)

This ground being sufficient to support the illegality proceeding, the Court was right in over-ruling the motion to dismiss that proceeding.

And this disposes of the first of the two cases.

In the second case, the only question which it is necessary to decide, is whether Mayo, the Sheriff of Lee County, is subject to be ruled in Muscogee County—in the Superior Court

Kellogg & Co. vs. Buckler & Short and Mayo.

of Muscogee County—for not executing the execution from the judgment aforesaid, rendered by that Court.

A rule against the Sheriff is either a criminal proceeding—a proceeding in which the State is plaintiff, or it is a civil proceeding—a proceeding at the instance of a private person—a proceeding which is a mere civil suit. (*Penal Code, Div. 15, Sec. 1. Jud. Act of 1799, Sec's 50, 52.*)

If it be a criminal proceeding, it must be taken in the county in which the crime was committed. So says the Constitution, *Art. 3.*

In this case the crime, if any, had to be committed in the County of Lee. That was the only county in which the Sheriff of that county could, as Sheriff, act or fail to act, under the *f. fa.*

If, therefore, the rule be a criminal proceeding, Lee was the county in which to take it.

If, on the contrary, the rule is a civil proceeding—a suit then also the rule, in this case, is to be taken in the County of Lee; for that is the county of the residence of the Sheriff, and he would be the defendant in the suit; and by the Constitution, all civil cases are to be tried in the county in which the defendant resides. (*Art. 3.*)

[4.] Either way, therefore, the Sheriff was not, in this case, to be ruled in the Superior Court of Muscogee County, although the *f. fa.* was the process of that Court.

This is the result which we get from the Constitution and from Statutes; and this we understand to be sanctioned by the long-continued and unbroken usage of the Superior Courts. If it is law, it will have to be logic.

So we also affirm the judgment of the Court below in this second case.

COLUMBUS, JANUARY TERM, 1855.

193

The Central Bank of Ga. vs. Williams, adm'r, &c.

No. 37.—THE CENTRAL BANK OF GEORGIA, plaintiff in error,
vs. WILEY WILLIAMS, adm'r, &c. defendant in error.

[1.] The Act of 1828 "to prevent the fraudulent enforcement of dormant judgments," does not apply to judgments in favor of the Central Bank.

Motion, in Muscogee Superior Court. Decided by Judge MORRILL, June Adjourned Term, 1854.

The sole question in this case was, whether a judgment and *fi. fa.* in favor of the Central Bank of Georgia became dormant after seven years, without an entry by the proper officer. The Court below held that the judgment was dormant. This decision is the only error assigned.

BETHUNE, for plaintiff in error.

W. WILLIAMS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] There is no special provision in the Act of 1828, "to prevent the fraudulent enforcement of dormant judgments," which includes judgments in favor of the Central Bank, or of the State specifically. The point made in this case depends, then, upon the question, whether or not the doctrine of *nullum tempus occurrat reipublicae* applies to debts due the Central Bank.

That it does not, we have just decided in the case of *Mahon, adm'r vs. The Central Bank*, and to that we refer for the reasons which influence our opinion.

We are, therefore, of the opinion that the Court erred in deciding that the *fi. fa.* in this case should be quashed; and the judgment is reversed.

Boyd vs. The State.

No. 66.—JOHN T. BOYD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] A principal in the second degree, may be tried before the principal in the first degree.
- [2.] A Juror was asked, "Do you reside in the City?" meaning the City of Columbus, in the County of Muscogee, where the proceeding was pending. He answered he did. "Have you lived here six months?" was the inquiry next propounded. He replied that he had not. He was objected to and discharged for cause—the Statute requiring a residence of six months to qualify a Juror to sit in a criminal case. No complaint was made at the time that the Court mistook the Juror's answer; nor was any attempt made to show the Juror competent: Held, that Counsel, by their silence and failure to make such effort, must be considered as having acquiesced in the construction put by the Court upon the Juror's answer.
- [3.] An indictment for the murder of an officer need not charge that the person killed was an officer; but it will be sufficient if it contain the general requisites of an indictment for murder.
- [4.] Although the warrant under which an arrest is made be not strictly lawful, or if it express not the cause particularly enough, yet, if the matter be within the jurisdiction of the Justice who issued it, the killing of the officer in execution of such warrant is murder.
- [5.] It is not proper for the Court to omit to give in charge to the Jury portions of the Penal Code, which have no application to the issue submitted, upon the pleadings and proof.
- [6.] Misdirection by the Court, upon an abstract principle of law, not appertaining to the issue, is no ground for a new trial.
- [7.] If any Sheriff, under Sheriff or other officer who hath execution of process be slain in doing his duty, it is murder in him who kills him, although there was not any former malice between them.
- [8.] Ministers of justice, while in the execution of their offices, are under a peculiar protection of the law—a protection founded in wisdom—and without which, the public tranquility cannot be maintained; private property secured, nor offenders of any kind be made amenable to justice.
- Murder, in Muscogee Superior Court. Tried before Judge STAFFORD, June Term, 1854.

David Wright, as principal in the first degree, and John T. Boyd, as principal in the second degree, were jointly indicted for the murder of Mark Robinson. The defendants severally

Boyd v. the State.

and the Solicitor General elected to place Boyd, the principal in 2d degree, upon his trial first; which being alleged by the Court, is assigned as error.

One Kelly, being called a Juror, was asked by prisoner if he lived in the City of Concord? He answered you the State's Counsel then asked him "If he had resided here for six months?" He answered in the negative. The State's Counsel challenged him for cause. The Court admitted this the last question to refer to the county answered the challenge. Counsel for prisoner asking no questions and making no objections. Which decision is now assigned as error.

The Court admitted evidence to show that Mr. Joseph Robinson, was Deputy Sheriff at the time of the homicide, and was acting in his official capacity. This decision is now assigned as error.

The Court admitted in evidence a peace warrant against Lloyd Wright, and two warrants for arrest, separately, against Wright and Boyd, by virtue of which Robinson arrested Wright and Boyd at the time they were shot. The admission of this evidence is assigned as error.

Subsequently, the State's Counsel moved to withdraw from the Jury the consideration of the two witnesses for a witness. The Court allowed the motion and this is assigned as error.

The Court charged the Jury, among other things, returning a general verdict of "guilty" or "not guilty." This charge is assigned as error.

The Court agreed to instruct the Jury, prior to the charge of homicide, holding that there was no such offense by principal in the 2d degree in Massachusetts. This omission by the Court is assigned as error.

A new trial was moved upon three several alleged errors, which being overruled, is the judgment.

WELBORN & CLARK, for petitioner et al.

Sol. Atty. Recd. and Referred by Committee.

Boyd v. The State.

By the Court.—LUMPKIN, J., delivering the opinion.

[1.] Was it regular for the Court to suffer the principal in the second degree to be tried before the principal in the first degree? The affirmative of this proposition is fully sustained by the authorities.

"Principal in the second degree," says Mr. Chitty, "were formerly denominated and regarded as only accessories at the first." And it seems that he who actually committed the crime, was alone guilty as principal; and those who were present and aiding and abetting, were but in the nature of accessories, and could not be put upon their trial until the principal was first convicted. This distinction has, however, been long since exploded; and now the stroke is considered as constructively given by all who consent and were present at its infliction; and they may be put upon their trial though the actual slayer is neither convicted nor found guilty." (1^o Chitty's *Urim. Lex.*, 180; 2^o ed. 9^o Coke, 67; b. *Pindar.*, 98, n. 1^o Hale, 137, 1^o Hawkins, b. 2 c. 20, §7.) These authorities we have examined, and they fully support the doctrine in the text, and the conclusion upon this point.

[2.] Should the State's Attorney have been permitted to cross-examine the Juror, Edward R. Kelly, for cause? When this Juror was offered, the usual Statutory questions were propounded to him, in order to test his competency. Having answered them in the negative, he was put upon trial again. He was then asked if he resided in the city? He said no sir. Have you lived here six months? was the inquiry next propounded. He replied that he had not; whereupon the Judge was discharged for cause. And the complaint is, that the Judge apprehended Kelly's answer; that he did not intend to say that he had not lived in the County of Muscogee six months, but that he had not resided so long in the City of Columbus.

Suppose this were so; what was the duty of the prisoner's Counsel? He should have called, in this case, the the Court

Boyd vs. The State.

labored under a mistake as to the Juror's answer. By their silence they must be held to have acquiesced in the understanding of Judge CRAWFORD. Counsel are under obligations to the Court and to the country, as well as to their clients. And they must be required to keep and observe, in good faith, the former as well as the latter.

But did the Court misunderstand the response of Mr. Kelly? We think not; there is not any necessary connection between the first and second questions, and the first and second answers. The Juror, it will be borne in mind, is in the court-house of Muscogee County, where the trial is progressing; and when the Juror stated that he had not lived *here* six months, he must be considered as meaning in the *county*, where the trial was had. Besides, it does not appear, nor was any attempt made to make it appear, that the Juror thus rejected was legally qualified to serve. The failure to make any effort to show his competency, is the best evidence, that if made, it would have proved unsuccessful. We are called upon, therefore, to pronounce the judgment of the Court below erroneous, for setting aside one as an exceptionable Juror, who was not proven to have been otherwise, nor any motion made to do so.

[3.] The next error assigned is, in suffering the peace-warrant to be read to the Jury. This process was issued in due form and by the proper officer; and placed in the hands of Mark Robinson, the Deputy Sheriff, by the Magistrate, to be executed. Being regular upon its face, we see no reason why it should have been withheld. But it is contended that this could not be done, there being no allegation in the indictment that the deceased was an officer acting in the discharge of his duty when killed. And this objection applies, not only to the peace-warrant, but to all the testimony which went to establish the official character of the deceased. We know of no principle or practice which renders such an argument necessary in a bill of indictment. This fact, like any other ingredient, must be established to sustain the charge of murder. But neither this nor any other evidence need be set out in the record.

Mr. White, in his work on *Criminal Law*, 3d Vol. p. 172,

Boyd vs. The State.

lays it down expressly, that 'where the indictment is for the murder of an officer, or in any case where the circumstances are complicated, it will be unnecessary to set out any of the details, and that the indictment will be sufficient, in such case, if it contain the general requisites of an indictment for murder.' And further—"that if more of the special circumstances in evidence of malice be stated, than is necessary, the prosecutor will not be compelled to prove them; but they may be rejected as surplusage." And he refers to Mackalley's Case, (Coke, James, 280.) The indictment in this case, an account of its minuteness, repetition and prolixity, will, a few years hence, be a curiosity to the legal antiquarian. It will be found *in extenso* in the 9th volume of Coke's Reports.

By the King's command, all the Judges of England were ordered to meet together, to resolve what the law was respecting the record of conviction. Accordingly, they assembled "and heard Counsel learned upon the special verdict, as well of the prisoners as of the King; and the matter was very well argued on both sides, at two several days," when all the Judges of England and Barons of the Exchequer held, that "when an officer is slain, as in the case before them, there needs not a special indictment upon all the matter, to be proved, as in this case was done; but a general indictment, that such a person, ex malitia sua precepsita percutiit, &c. And although there be not proof made of any precedent malice, yet the indictment is good; for the law presumes malice." Judgment was given accordingly, and Mackalley was exonerated.

It is gratifying to find mature investigation upon every point decided in this case, so abundantly fortified.

[4.] It is assigned as error, that other warrants were allowed to go illegitimately to the Jury, and then to be exhibited against the consent of the defendant. There were a couple of warrants sued out against Wright and Boyd, by Mr. Henry Johnson, and intended to charge them with the offence of a riot. The warrants were defective in not alleging that other persons were concerned in the offence; and it is argued that on account of this omission, no crime was charged.

Boyd vs. The State.

is stated that a warrant is valid without setting forth any crime. (1 Crim. Law, 41. See, also, 2 Hale, 111. 1 Hale, 260, and Black's J. Warrant, 1.) The authorities which seem to contradict this have confounded the law as applicable to commitments, with that which relates to warrants. In commitments, it is always necessary to set out the charge or offence; but not so in warrants. Indeed, some of the cases go to the extent of maintaining that cases may occur in which it would be impudent to let even the peace officer know the crime of which the party to be arrested is accused. (1 State Trials, by Hanggrave, 304, 323. Com. Dig. Imprisonment, 11. 7. Bacon's Ab. Treas. D; 8.)

In Mackalley's case, to which I have before referred, it was resolved, amongst other things, that if there be error in awarding process, or in the mistake of one process for another, and an officer be slain in the execution thereof, the offender shall not have the advantage of such error; but that the killing of the officer, when he comes to make an arrest in the King's name, is murder.

In Hale's *Pleas of the Crown*, 1 Volume, p. 460, we find this principle distinctly enunciated: "And although the warrant of the Justice be not in strictness lawful, as if it express not the cause particularly enough; yet, if the matter be within his jurisdiction as Justice of the Peace, the killing of the officer in execution of such warrant, is murder; for in such case the officer cannot dispute the validity of the warrant, if it be under seal of the Justice."

If this be the law, and who will doubt its reasonableness, it is decisive of this exception. It would be monstrous to lay down a different rule. It would put in jeopardy the life of every officer in the land. It never could be intended that they should determine, at their peril, the strict legal sufficiency of every precept placed in their hands.

If it were legal to admit this testimony, to withdraw it is no ground of complaint, on the part of the prisoner. Indeed, had the evidence been illegal, its withdrawal would have cured the

Boyd vs. The State.

objection. A fortiori is the withdrawal of legal proof no error.

[5.] The next complaint is to the charge of the Court. His Honor, Judge CRAWFORD, instructed the Jury, "First, as to the definition of murder; and then, as to what constituted the offence of principal in the second degree. And secondly, that they must determine whether a murder had been committed; and if they should so find, then ascertain from the evidence, if the defendant was present; and if present, did he aid and abet in the perpetration of the crime? And if they should so find, then they would return a general verdict of guilty. But if the testimony should show that the allegations in the Bill of Indictment were untrue, then they should render a verdict of not guilty, there being no such offence as principal in the second degree, in manslaughter, known to the laws of Georgia."

This is the whole of the charge; and the errors assigned upon it are—

1st. In omitting to instruct the Jury in all the grades of homicide contained in the Penal Code.

2d. In charging the Jury as to the definition of murder only; and

3d. In instructing the Jury that they were compelled to find a general verdict, of guilty or not guilty.

[6.] It is conceded that if the evidence created a reasonable doubt as to the grade of the crime committed by the defendant, that the objection to the charge of the Court, or rather, its failure to charge, would have been well taken. It becomes necessary, therefore, to glance at the testimony. It may be thus briefly summed up: Wright and Boyd being charged with a violent trespass on the domicil of one Nancy Johnson, in the City of Columbus, crossed over on the opposite side of the river to avoid an arrest. At Gerard (Alabama) they were seen by the deceased and one Gammul, late in the afternoon of the day preceding the homicide. They inquired of the deceased, who was Deputy Sheriff of Muscogee County, and, which fact was well known to them, if he had warrants for them? He replied that he had not, but that warrants had been issued;

Boyd *vs.* The State.

and he advised them, if they wished to avoid an arrest, to keep on that side of the river. It is fairly inferable, that this visit was made to induce them to do so. They promised Robinson to keep out of the way, unless they concluded to come over and give themselves up or compromise with the prosecutrix. But contrary to this friendly warning on the part of the officer and promise on their part, they crossed the river at early night-fall. They were seen in the City of Columbus and conversed with by sundry persons, and avowed their determination to die rather than be taken. They passed the deceased in the street, but being partially disguised, supposed that he did not recognize them. They had been observed, however, and Robinson summoned a friend or two to his assistance, remarking, "that Boyd and Wright had come back, and he would be compelled to arrest them." They were standing near a grocery called "*Pleasant Hour!*" (Heaven save the mark!) Robinson walked up to them saying, "you are my prisoners—I have a warrant for both of you." And as soon as deceased laid his hand on Wright, he (Wright) jerked a pistol from his right side, and shot Robinson; and while he was falling, Boyd, who was a few paces off, also fired at him. And this constitutes the whole proof in the case. And there is not one mitigating circumstance to change its type or coloring.

We ask, what had the law of manslaughter to do with this case? What a mockery and farce for the presiding Judge to have instructed the Jury as to *involuntary* manslaughter in the commission of an unlawful act or a lawful act, without due degree of caution and circumspection! And yet, he is charged with having committed "manifest error" in omitting to do this. He would have been guilty of manifest folly if he had. He is required to instruct the Jury as to the law of the case, which is submitted to them. And this he did by defining murder, and giving them in charge the law as to principals in the second degree. It is right and proper for the Court to tell the Jury, if such and such things have been proven, that the law is so and so. Generalities, in charging, is worse than use-

Boyd *vs.* The State.

less. Instead of assisting, it but too often misleads the Jury. Read from the Alcoran or the Talmud, but not from a law book which does not apply to the particular case made by the pleadings and proof, and which the Jury has to try. The charge, in this case, was succinct, but clear and pertinent. There was no dispute as to the evidence. The credit to be given to the witnesses the Court very properly left to the Jury. If they believed the testimony, they were bound to convict the prisoner of the crime for which he was indicted. If the proof was not trustworthy, an acquittal should have followed; and so the Court charged the Jury.

[7.] In the leading case of Mackalley, to which I have several times before alluded, the whole bench, *nullo contradicente*, resolved, Chief Justice Coke being their mouth-piece, "that if any Sheriff, under Sheriff, Sergeant or officer who hath execution of process be slain in doing his duty, *it is murder in him who kills him*, although there were not any former malice betwixt them; for the execution of process is the life of the law; and, therefore, he who kills him shall lose his life; for that offence is *contra potestatem regis et legis*; and, therefore, in such case, there needs not any inquiry of malice."

As to the abstract proposition, of whether or not there can be a principal in the second degree in manslaughter, the Court may have been mistaken. We are inclined to think the Court was. There cannot, it is true, be accessories before the fact in manslaughter. We see no reason why there may not be *at* the fact. And principal in the second degree is but another name for accessories *at* the fact. One thing is certain—Wright may have been convicted of murder, as he has been, and Boyd of manslaughter.

Are we constrained, then, by the New Trial Act, to reverse the judgment and remand this cause for a re-hearing? It is no misdirection *against the prisoner*—and the words of the Statute require that it should, before the party can claim any benefit under the law. It might just as well be said that a misdirection as to the law of *arson* was against the accused. The same Act requires, that if Counsel request the Court, in

Boyd vs. The State.

writing, to give a legal charge, and he refuses to do it in the language required—that a new trial shall be granted. Suppose that in this case the Court had been asked, in writing, "to charge the Jury, that to constitute *burglary*, there must be both a breaking and entering, &c., and the Court had either declined or substituted a charge of its own, which was wrong, stating that the mere entering, &c. was sufficient, would we have sent the case back on that account? surely not. Here the pleadings, it is true, put in issue the crime of manslaughter; for the indictment being for murder, put in issue not only that offence, but every lower grade of homicide also, just as though there were a separate count for each. But the evidence introduced going to the crime of murder only, all the minor grades of homicide, although contained in the true bill, were, nevertheless, withdrawn or dropped, for want of proof in the issue finally submitted to the Jury. An error in the charge, then, as to one of these minor offences, was necessarily an abstraction.

And this may be illustrated by a reference to the rules of pleading in civil cases. An action of assumpsit is brought, in which are two counts—one on a promissory note, the other on an open account. No proof is offered under the former as to the note; still, the Judge, in his charge to the Jury, trips in his instructions as to the law of promissory notes; still, the verdict of the Jury is based upon the second count only, and is right. Can the misdirection of the Court upon the law, as applicable to the first count, be made the ground of a new trial? surely not. For notwithstanding the promissory note was put in issue by the declaration, yet no proof having been offered respecting it, it is necessarily withdrawn from the consideration of the Jury. And this is the defendant's case. Had there been a scintilla of proof to reduce the offence from murder to manslaughter, he would have been entitled to a new trial. We would not have allowed ourselves to have speculated as to its weight.

And this disposes of all the grounds taken in the assignment of errors.

[8.] Poor Robinson, with his last expiring breath, said to

Terry *vs.* The State.

his mother—"it was hard." And it would be hard indeed, if while this young man, in the mild but manly discharge of his duty, is shot down like a dog, his murderer should go unavenged by that law whose minister he was. Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law—a protection founded in wisdom and in every principle of political equity; for without it the public tranquility cannot possibly be maintained or private property secured; nor, in the ordinary course of things, will offenders of any kind be amenable to justice.

No. 39.—JAMES L. TERRY, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] Notwithstanding the Court may charge the Jury generally, as to the various grades of homicide; still, it is the right of the defendant to ask specific instructions as to any particular point, provided there is proof to warrant it.

[2.] Under the New Trial Act of 1853-4, the defendant is not called upon to show, affirmatively, that injury has resulted from the refusal of the Court to give a legal charge as requested; the Statute assumes that damage is done, and will listen to no allegation to the contrary. It makes the refusal to give a legal charge, when requested, and the granting a new trial, convertible terms.

Indictment for murder, in Muscogee Superior Court. Tried before Judge WORRILL, June Adjourned Term, 1854.

The Jury in this case found a verdict for "Involuntary manslaughter in the commission of an unlawful Act." A motion was made for a new trial, and the refusal to grant the rule *nisi* is the only error assigned in this Court.

The first ground for a new trial was—

1. Because the Court erred in charging, that if the prisoner, with malice aforethought, either express or implied, slew the

Terry *vs.* The State.

deceased, he was guilty of murder. The Court certified, as to this ground, that he had previously fully and carefully explained to the Jury every grade of homicide.

2. That the Court erred in charging the Jury, that they should find the prisoner guilty in several supposed state of facts—in no one of which was the Jury instructed, that in order to find the defendant guilty, it was necessary it should appear that the offence was committed prior to the finding of the bill, and within the County of Muscogee.

3. Error in charging, that if deceased assaulted or attempted to assault or commit a serious personal injury on the prisoner, and the prisoner, in the sudden heat of passion, thereupon slew the deceased, then the prisoner was guilty of voluntary manslaughter.

4. In refusing to charge as requested, as follows: That if the deceased and prisoner alighted with a common intent to fight, and prisoner killed the deceased with a knife; yet, if when prisoner drew his knife, he apprized the deceased of it, and abandoning the intent to fight, did not advance on deceased, but threw himself on the defensive, and the deceased advanced upon the prisoner and struck him with a chunk or stick, before prisoner used his knife, and they should believe that prisoner used the knife in defending himself against such blow, then he was not guilty of the crime of murder, with which he was charged. (The Court certified that he refused to charge *in these words*, because the evidence did not show the facts to exist as alleged in the request.)

5. Error in rejecting the evidence of one Motly, that Wilson, one of State's witnesses, declared to him on one occasion, that the prosecutor, Doles, owed him some money, and if he did not pay him he would turn a Terry man; and that he knew more in favor of Terry than he did against him. (The Court certified that no foundation was laid for this impeachment.)

6. The discovery of new evidence, viz: of Sarah J. Windham—that she heard Mary Perry, one of State's witnesses, say,

Terry vs. The State.

a few days before the trial, that the killing was a pure accident, and prisoner was obliged to do what he did.

7. The newly discovered evidence of Silvanus Prince, to prove circumstances going to impeach one of the witnesses of the State.

The two last grounds were supported by affidavits.

8. The mistake of three of the Jury as to the verdict rendered—they supposing it was for “Involuntary manslaughter in the commission of a lawful act, without due caution and circumspection.”

This ground was sustained by the affidavits of the Jurors.

The refusal to grant a rule nisi is the error assigned.

Judge BENNING having been of Counsel, did not preside in this case.

COLQUITT & WELLBORN, for plaintiff in error.

Sol. Gen'l BROWN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In the progress of this trial the Court was requested, by Counsel for the prisoner, to charge the Jury, “that if they believed that the deceased and prisoner alighted with a common intent to fight, and that prisoner killed deceased with a knife; yet, if, when prisoner drew his knife he apprized the deceased of it, and abandoning the intent to fight, did not advance on the deceased, but threw himself on the defence, and the deceased advanced upon the prisoner and struck him with a chunk or stick, before the prisoner used his knife; and they should further believe, that prisoner used the knife in defending himself against such blow, then he was not guilty of the crime of murder with which he was charged.”

This charge the Court refused to give on two grounds—1st. Because it assumed a state of facts which did not exist; and

Terry vs. The State.

2dly. Because he had charged the Jury already, as to the law, generally, regulating the various grades of homicide.

[2.] It is scarcely necessary, we apprehend, to discuss the sufficiency of the last reason assigned by the Circuit Judge, for refusing to give the charge requested. For notwithstanding he may, at the beginning of his charge, have instructed the Jury generally, upon murder, manslaughter and justifiable homicide ; still, it was the right of the prisoner to ask a specific charge upon the point to which the attention of the Court was called, provided there was any proof in the record to warrant it. His Honor, Judge CRAWFORD, held that there was not; hence, it becomes necessary to refer to the evidence upon this point ; and the only difference of opinion which could exist between Counsel and the Court, must have been as to one fact, namely : whether there was any proof that the defendant had abandoned his purpose to fight. And to ascertain this, we propose to refer to the testimony of a single witness only.

Mr. John B. Redding, the only person present with the parties when this rencontre took place, says, "that about 2 o'clock, P. M. on 2d day of June, 1850, witness and deceased were riding the road together. Prisoner came up in a buggy, behind, in a fast trot, and as prisoner passed, deceased told prisoner "not to ride so close to them." Prisoner observed, "he be d——d if he did not drive over him, if he wanted to." Deceased replied, "You had better try it then." Prisoner repeated what he had said before. Deceased then cursed prisoner. Prisoner then asked deceased if he wanted a fuss ? He replied, that "he had as leave have one as not." Both dismounted—as prisoner got out of his buggy he said, with an oath, that "he never backed out of a fuss." They stripped off their coats—while deceased was putting his down, prisoner took his knife out of his pocket and opened it. Prisoner then said, "come ahead, I am ready." Deceased then walked up to prisoner and said, "I suppose you have drawn your knife?" Prisoner replied, "Yes I have." Deceased then picked up an old piece of chunk and struck prisoner on the arm, as he threw it up to ward off the blow, and the chunk fell out of deceased's

Terry *vs.* The State.

hands. Prisoner then began to make licks with his knife and made several; when prisoner struck deceased with his knife he broke loose from deceased, who had hold of prisoner by his arm and shirt, and ran. As prisoner jerked away from deceased his shirt was torn. Deceased followed after prisoner and threw the black-jack chunk at him and struck him between the shoulders, which broke his gait in running. After prisoner dismounted from his buggy, he walked off a piece, so that deceased was nearer the buggy than prisoner when prisoner told him to come on—*thinks prisoner remained standing and deceased advanced towards prisoner.* They met about ten steps from the buggy—were four or five steps apart when deceased observed to prisoner, you have drawn your knife. After the affair was over, witness remarked to prisoner, “your fuss has turned out just as I expected.” Prisoner replied, “I did not want to cut him but he was too large for me.” The knife used was a common size Congress knife.

Thus it will be seen, that after Mr. Terry got out of his buggy and drew his knife, exhibiting it openly to the deceased, he made no aggressive movement upon his adversary. Might not the Jury have inferred, taking into consideration the great difference in the relative manhood of the combatants, that Terry, having gone thus far to maintain the appearance of courage, became *irresolute*, at least to the extent of making no assault upon his foe—and that his final purpose was to stand altogether upon the defensive? And is not this inference not only deducible, fairly, from what preceded the conflict, but still further strengthened from what followed? Just so soon as he could extricate himself from the deceased, after receiving and inflicting the first blow, he turned and fled, and that, too, notwithstanding he still retained his knife? Man does not differ from the lower order of creation, so far as his animality is concerned. And if he desires to study himself in this respect, let him go to the beasts of the field and the fowls of the barn-yard to learn wisdom. Who has not witnessed the hostile advance of the boar—the bull and the cock? With what seeming defiance they approach each other; when upon the eve of collision—the

Terry *vs.* The State.

courage of the weaker or more timid fails, and after parrying the onset, or perhaps without waiting to receive it, the bold braggart turns and flees.

Such the Jury might well have believed was the true construction to be put upon this transaction. And if so, the charge requested was legal—being warranted by the proof; and the Court was bound to have given it. The New Trial Act of the last Legislature is explicit and imperative upon this subject. (*See Duncan's Digest of the Acts of 1853-4*, p. 16.).

But it is argued, that inasmuch as the Jury returned a verdict for manslaughter and not murder, that the refusal of the Court to charge in relation to the higher offence, could not have prejudiced the prisoner—this may be true; still, if the charge was authorized by the pleadings and the proof, there is no discretion left to the Courts. A new trial must be awarded, whether any injury has been done or not. The law, in such case, presumes injury. This case has been analogized to that of Boyd, disposed of at the present term. The distinction between the two is plain and palpable.

In Boyd's case, it was conceded that the Court erred as to the law relative to manslaughter; and further, that manslaughter, as well as murder, was put in issue by the *pleadings* in Boyd's case. But it is also true that there was not before the Jury a particle of *proof* to justify a verdict for manslaughter. Hence, we refused to send the case back, to give the Jury an opportunity to find contrary to law, when they had found in accordance with it. Terry's case is like Boyd's in this—the indictment being framed and found for murder, put in issue upon the trial every grade of homicide. But it differs from Boyd's in this: not only is manslaughter, about which the Court refused to charge, and as to which there was some proof, put in issue by the pleadings, but by the proof also. And therefore, it was the privilege of the defendant to have the benefit of the charge requested.

By the refusal of the Court to instruct the Jury, that if the facts existed which the request assumed, and which, in the

Terry *vs.* The State.

opinion of this Court, the Jury had a right to infer did exist, the offence could not be murder, the Jury might have doubted whether they ought not to have convicted the prisoner of murder, and therefore would the more readily have rendered a verdict for the highest grade of manslaughter. And thus the defendant may have been, and probably was, damaged.

But we are not called upon to show, affirmatively, that injury was done. The New Trial Act assumes, that under such circumstances, injury is done, and will not listen to any allegation, to the contrary. We may be satisfied that the verdict is right. *We are fully satisfied that it is*—still, we have no discretion—our hands are tied by the last Legislature. The refusal to give a legal charge when requested, and the granting a new trial, are made, by the Act of 1853—4, convertible terms.

If told, as we have been, by the able and zealous Counsel who have argued these cases, that in Boyd's case the Jury might have fallen back upon the crime of manslaughter instead of murder, had they not been instructed that no such offence existed, we re-iterate, the evidence did not allow to them this privilege. Neither the Jury, in a civil or criminal case, nor any human tribunal, nor any other being, has the right to do wrong. And it would be both legally and morally wrong in this or any other Court to award this privilege.

Upon the foregoing ground, then, alone, we are compelled to grant a new trial, however unwilling we may be to disturb this verdict.

From the present excited state of public opinion, defendants who are convicted need expect little from Executive or Legislative clemency. Consequently, it becomes the solemn duty of the Courts to watch with the greatest circumspection over State trials, and to see to it not only that no acknowledged right is withheld, but that the benefit of a reasonable doubt, either as to the law or the facts, be given to the accused. And, if error be committed, let it be on the side of mercy, rather than of justice. The Coronation Oath of the British Sovereign constrains even the monarch on his throne to administer the

Robison *vs.* Banks.

law in mercy—and the official oath of every judicial functionary, high or low, contains, expressly, or impliedly, the same obligation. It is Heaven's law, and Earth need not be ashamed to imitate the example.

No. 40.—ALEXANDER J. ROBISON, plaintiff in error, *vs.* JOHN BANKS, defendant in error.

- [1.] Whenever an execution may be proceeding illegally, though it issued legally, the affidavit of illegality is a remedy.
- [2.] Issue on an affidavit of illegality, to a certified subpoena-account, that the number of days of attendance charged for by the witness, was too great, and charge of the Court to the effect, that the subpoena-accounts were *prima facie* evidence for the witness: *Held*, that the charge of the Court was right.
- [3.] A witness cannot charge for attendance rendered after the case has been postponed or continued, whether he happens to hear the announcement of the postponement or continuance or not.
- [4.] The same party summons a person as a witness in more cases than one: *Held*, that the witness may charge full fees in each case.

Illegality, in Muscogee Superior Court. Tried before Judge WORRILL, June Adjourned Term, 1854.

Alexander J. Robison summoned John Banks as a witness for him, in nine several cases, serving a subpoena in each case. Banks swore that he attended eight days at one term and thirty-eight days at another term, and caused the subpoenas thus proven to be levied on a city lot. Robison made "an affidavit of illegality," alleging—1st. That Banks did not attend as alleged. 2nd. That the presiding Judge announced, early in each Court, that the cases would not be tried, unless he could get another Judge. 3d. That Banks was entitled to

Robison vs. Banks.

claim only on one subpoena for each day's attendance. 4th. That subpoetas could be levied only on personality.

At the trial, Counsel for Banks moved to strike out the last ground, as insufficient. The Court granted the motion, and Robison excepted.

Judge IVERSON, as a witness, stated that as presiding Judge, he did make the announcement as to the trial of the cases, early in the term. The Court charged the Jury, that Banks having proven his attendance by his affidavit, the same was evidence for him of such attendance, and would entitle him to recover, until the same was disproven, or in some other way avoided by Robison. To this charge Robison excepted.

The Court farther charged, that if the Jury believed the presiding Judge made the announcement from the Bench, in open Court, that the cases would not be tried, and that Banks was present and heard it, then he would not be entitled to payment after that time. But if Banks was not present, or was not notified of it by the party subpoenaing him, then he was entitled to payment.

To this charge Robison excepted. The Court farther charged, that if Banks was entitled to any thing as a witness, he was entitled to his *per diem* pay on each subpoena. To this charge Robison excepted. On these several exceptions error is assigned.

INGRAM & CRAWFORD, for plaintiff in error.

DOUGHERTY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The Court below decided, that the levy of a certified subpoena-account on land, is a matter which cannot be reached by affidavit of illegality. This decision is the first assigned as erroneous.

A part of the thirty-second section of the Judiciary Act of 1799, is as follows: "In all cases where execution shall issue

Robison *vs.* Banks.

illegally, and the person against whom such execution may be, shall make oath thereof; and shall state the causes of such illegality, such Sheriff shall return the same to the next term of the Court out of which the same issued, which Court shall determine thereon, at such term." (*Cobb's Dig.* 509.)

The word "issue," in this section, has always, to the best of the knowledge and information of this Court, been considered and treated as having the sense of the word proceed. That is the sense which the word is assumed to have by the rule of Court which has reference to the affidavit of illegality, for the only case which that rule provides for, is a case in which the illegality consists, not in the execution's having issued illegally, but in its *proceeding* illegally, though it was issued legally. It is the case in which, notwithstanding that a payment has been made *on the execution*, the execution is proceeding, as if no payment had been made on it. The rule is in these words: "When an affidavit of illegality is made, on account of partial payment made on the execution, the defendant, at the time of making such affidavit, must pay up the amount he admits to be due, or the Sheriff shall proceed to raise the amount, and accept the affidavit for the balance."

The reason why the word, to "issue" has been thus treated as having the sense of the word to proceed, is, perhaps, two-fold—first, the word was probably used in that sense in the Acts from which it was, by the Judiciary Act of 1799, adopted, viz.: the Judiciary Acts of 1792, 1796? 1797.. Secondly, the Statute using the word is a remedial one, and was intended, in all likelihood, to furnish a substitute for the remedy by *quidam querela*—a remedy that lies for a man in execution, or in danger of it, when he has matter, in fact or in writing, to avoid such execution, and no other means to take advantage of it; that is, a remedy as much for matters arising after the issuing of the execution, as for matters arising after the judgment, but before the issuing of the execution. (*Wat. Dig.* 485, 616, 631.)

[1.] All this being so, it is too late, now, for Courts to inter-

Robison vs. Banks.

pose and say that the word shall be no longer taken in the sense of the word proceed.

Taken, then, in the sense of that word, the decision of the Court below was wrong; for the Statute which turns a certified subpoena-account into an execution, the Judiciary Statute of 1799 authorizes such an execution to be levied of "goods and chattels" only, and the certified subpoena-account, in this case, was proceeding to be levied of *land*.

[2.] The charge of the Court below, that Banks, the witness, having proven his attendance by his affidavit, the same was evidence for him until disproven, we understand as amounting to no more than a statement to the Jury; that the subpoena-accounts, in their certified condition, were *prima facie* evidence of the correctness of the claim of Banks. And this they, certainly were.

[3.] Section twenty-one of the Judiciary Act of 1799, is as follows: "When a subpoena shall be served on any witness, in conformity to this Act, it shall be the duty of such person so summoned, to attend, from time to time, until the cause in which such witness shall have been summoned, is tried or be otherwise discharged by the Court." Duty to attend from time to time until discharged, means duty to be present, in Court, from time to time, until discharged. If, therefore, a witness is not present in Court when the case is postponed or continued, and so fails to hear the announcement of such postponement or continuance, it is his own fault; and he is not justified in attending afterwards and charging for his attendance.

The witness, therefore, in this case, was not justified in charging for attendance rendered after the announcement made by the Court, that the cases in which he was summoned would not be tried; and so we think the Court below should have told the Jury.

Is a witness, attending under subpoenas in different cases, at the instance of the same person, he a party in all of those cases, entitled to charge full fees in each case? The Court below told the Jury that a witness is. And we think, told them properly.

Robison *vs.* Banks.

The Fees Bill Act of 1792 says: "To each witness per day, for his or her attendance, for coming and returning, allowing 30 miles for a day, not allowing for more than three witnesses to be paid by the person summoning the same, and taxed in the bill of costs '75" (cents.) By the Act of 1839 seventy-five cents a day is raised, for Muscogee County, to one dollar and fifty cents. (*Cobb's Dig.* 858. *Acts of 1839*, 141.)

"Taxed in the bill of costs," must mean taxed in the bill of costs of the case in which the witness may have been subpoenaed. In every case there is a bill of costs. If, therefore, there are more cases in which the witness has been subpoenaed than one, there will be more bills of costs in which his *per diem* is to be taxed than one.

The party, then, that summons a witness in more cases than one, has the right, if he gains the cases, to tax his adversary with full fees for the witness, in each case: But if he has the right to tax his adversary with full fees in each case, it must be because he, himself, was under obligation, in the first instance, to pay the witness full fees in each case; that is to say, it must be because the witness, in such a state of things, is entitled to be paid full fees in each case.

And if in such a state of things the witness is entitled to be paid full fees in each case; that is to say, in a state of things in which the party calling him has the right to tax his adversary with the fees, then the witness is entitled to be paid them in each case in any and every state of things: for there is no law from which it can be presumed that the Legislature intended that the amount of compensation to a witness, was ever to be greater, if the party calling the witness should gain the case, and so acquire the right to tax his adversary with such compensation, than it was to be if that party should lose his case. On the contrary, there is law from which it is to be inferred, that the Legislature intended the fees of a witness to be the same, whether the party calling him should gain his case or should lose it. The Act of 1792 gives the witness the right to make out his account for attendance, on the last day of his attendance in each term. And it may, and frequently does hap-

Robtson v. Banks.

pen, that such day comes before that of the termination of the suit, and so, before it can be known which party will succeed—which fail. (*Cobb's Dig.* 277.)

[4.] The result, then, seems to be, that a witness is entitled to charge the party which has summoned him, full fees for each case in which he may have been summoned.

The correctness of this conclusion, drawn from the words of Statutes, is confirmed by what has, as far as we know, been the uniform practice of all the Courts—a practice, perhaps as old as those Courts. Those Courts have always, we believe, allowed witnesses to charge full fees for each subpoena.

And yet, when the result to which the law, if this conclusion be correct, may, as exemplified in this case, lead, is considered, it is very difficult to think that the Legislature ever intended such to be the conclusion. In this case, the witness is summoned by the same party, in nine cases. He attends forty-six days, and for such attendance he charges, for each case, one dollar and a half a day—thirteen dollars and a half a day in all the cases. To allow such a charge, is to say that witnesses, in some cases—and those cases in which the witnesses are put to no unusual trouble or loss, shall be paid at a higher rate than the Governor of the State or members of Congress. Did the Legislature intend to say what would lead to this? Hardly. Still, this results from what they have said and what they have left unsaid. They have said nothing to authorize any other rule than this.

If the Legislature had said, that in such case as this, or in cases in which the same person may be summoned by different parties, the witness should be entitled to have, for attendance in all the cases, no more than a named sum per day, to be collected at his option, out of any of the parties calling him, if called by more than one, provided the time for which he attended for that party, was as much as the whole time of his attendance; and if not as much, then to be collected, in part, out of him, and as to the rest, out of another or others of those calling him—and had further said, that the party or parties out of whom he might so collect his pay, should have the right

GAZETTE, JANUARY THREE, 1855.

Clayton vs. Brown.

to exacted contribution to themselves from the other parties, so that the ultimate portion, which each party would have to pay, would be in proportion to the service he had received from the witness; that is, in proportion to the length of time for which the witness had attended for him; then, of course, the conclusion to which we have come would have been different. But this the Legislature have not said.

On this point, therefore, we think the Court below was right.

No. 41.—PHILIP A. CLAYTON, plaintiff in error, vs. DEMPSEY BROWN, defendant in error.

- [1.] Where personal property is conveyed, by a husband, to a trustee, for the benefit of his wife and children, the subsequent possession by the husband being consistent with the object of the deed, is no evidence of fraud.
- [2.] To make a voluntary conveyance void against creditors and purchasers, within the Statute of *Elizabeth*, it must be covinous and fraudulent, and not voluntary only.

Trover, &c. in Muscogee Superior Court. Tried before Judge WORRILL, December, 1854.

This was an action for a negro man, Charles, brought by Dempsey Brown against Philip A. Clayton. Brown claimed under a sale by the Sheriff, of the negro, as the property of one Reeves. Clayton claimed under a deed of trust from Reeves, for the benefit of the wife and children of Reeves. The depositions of one Holmes stated, among other things, that Reeves was indebted to him \$184, by note, which note he sued to judgment. Objected to by Clayton, on the ground that there was higher and better evidence. Overruled, and

Clayton vs. Brown.

Clayton excepted. In answer to cross-interrogatories, he said, "All I know of his indebtedness to others, in the years 1836 and 1837, is, that there was a great complaint by his creditors, that he did not or would not pay." Objected to by Clayton as hearsay. Overruled, and Clayton excepted.

Plaintiff below offered in evidence a transcript from the record of Bibb Inferior Court, showing—1st. The proceedings by P. A. Clayton, in 1838, to establish a lost note and mortgage made by Reeves; the foreclosure of the mortgage, the *fi. fa.* and return of *nulla bona*; also, several other *fi. fas.* issuing from that Court in 1838, against James T. Reeves. Clayton's Counsel objected on the ground, the testimony was irrelevant. The Court overruled the objection, and Clayton excepted.

The Court charged the Jury, "that if, from the evidence, they believed that Reeves remained in possession of the property, after the making of the deed of trust, such possession was evidence of fraud, and they were to presume fraud in the making of the deed from such possession in Reeves; but that the defendant might rebut such presumption; and if satisfactorily explained, the presumption was removed." To this charge Clayton excepted.

The Court farther charged, "that if the deed was a voluntary conveyance to Clayton by Reeves, for the benefit of Reeves' wife; and if the negro was levied on by the Sheriff, under a *fi. fa.* and sold, and Brown became the purchaser without actual notice of such deed, then Brown's title was good; that the registration of the deed was not sufficient notice to Brown."

To all of this charge Clayton excepted.

Of these several exceptions error was assigned.

Judge BENNING having been of Counsel, did not preside.

INGRAM & CRAWFORD, for plaintiff in error.

DOUGHERTY, for defendant in error.

Clayton vs. Brown.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Without caviling about minor matters, we would say, that we are not satisfied with the manner in which this case was submitted to the Jury. If the record speaks right, it was not upon the true ground; and upon the issues which ought to control it.

The Court instructed the Jury, that if James T. Powers remained in possession of the property named in the trust Deed, executed by him to Philip A. Clayton, for the benefit of his wife and children, after the conveyance was executed, that it was evidence from which fraud should be presumed.

Now, that fraud may be committed by a debtor upon his creditors, as well by using his children as instruments as strangers, will not be denied. And such was the opinion of this Court in *Fleming vs. Townsend*, (6 Ga. R. 102.) But that is not the question. Is the continued possession of property under such a deed, even a badge of property? If it be true that the wife and children have the strongest claims upon the bounty of the husband and father, and that it is his duty to provide for them, and the possession is consistent with the nature of the instrument, how, we would ask, is that possession converted into a badge of fraud? If we have not misapprehended the rule itself, as well as the reason upon which it is founded, the retention of possession by the vendor of personal property, after an absolute sale, is, *prima facie*, fraudulent and conclusively so, if unexplained, because, retaining possession under such circumstances, is contrary to the nature of the conveyance. But no such presumption does or can legitimately arise, where the continued possession is reconcilable with the transfer. So, where personal property, as in this case, is conveyed by a husband and father, to a trustee, for the benefit of his wife and children, the subsequent possession of the husband and father, is consistent with the object of the deed, and is no evidence whatever, of fraud in behalf of a subsequent purchaser. The possession of the vendor is, in fact and in judgment,

Clayton vs. Brown.

of law, the possession of his family. And for myself, I am strongly inclined to think that such would be the construction which the law would put upon the transaction, unless the husband and father were living separate and apart from the child whose trust.

[2.] We cannot concur with Mr. Hunter, the presiding Judge, upon the other point of his charge; which was, that if Brown bought the boy Charles, one of the negroes named in the deed, at Sheriff's sale, without actual notice of the deed from Ropes to Clayton, that he acquired a good and indefeasible title to the slave, and the Jury must so find.

Far be it from us to controvert the rule; that a gift or conveyance, founded merely upon a good consideration, such as blood or affection, may not be set aside by creditors, if it appear that the grantor was in embarrassed circumstances when he made it. For it has been well said; that a man must be just before he is generous; and that he is bound, both legally and morally, to pay his debts before giving away his property. Still, we do maintain that the mere fact that a man is indebted at the time, will not render his gift, ipso facto, void. (*Hinds's Bessemer vs. Longworth*; 11 Wheat. R. 729. *Verplanck vs. Story*, 12 Johns. R. 588. *Rogers vs. Livingston*; 8 Johns. Ch. Clos. 497, 501. *Sexton vs. W.heaton*, 8 Wheat. R. 229. *Bullard vs. Bedford Bank*, 11 Mass. R. 421. 1 Story's Eq. Ju. 362, 362, a, 363, 364, 365. *Cadogan vs. Kennett*, Chwp. R. 432.)

And although the cases exhibit some apparent diversity on this point, it will be found, upon a careful examination, to arise only from a difference of opinion as to what amount of indebtedness or indebtedness, to adopt a more modern word, constitutes sufficient evidence of fraud. In the sections to which we have already referred, in *Story's History of Jurisprudence*, beginning further back, at 355, and running to 366, inclusive, Judge Story reviews the principal cases, and gives the weight of his authority against the doctrine, that every voluntary assignment, for which a valuable consideration is not given by a person indebted at the time, is per se void against creditors.

Chapman & Towns.

Bellard, the enlightened opposition of the Statutes of 18 and 27 Elizabeth, by Lord Mansfield, as applicable to this class of cases, is now pretty generally adopted, in England as well as throughout this country. The world begins at last to realize the fact, however slow and reluctant to admit it, that there are some other people in the world besides creditors; and that a husband and father, instead of having his body divided out amongst his creditors, as directed by the old Roman law, or subject to perpetual incarceration in the dungeons of a jail, as authorized by the English law, may give his property to his wife, and children, and labor for their sustenance and support, provided he does so fairly, and with no intent to perpetrate a fraud upon his creditors. (*Townsend v. Westcot*, 2 *Brav. R.* 340, 345. *Salmon v. Bennett*, 1 *Copq. R.* 525.)

Said Lord Mansfield in *Cadogan v. Kennett*, "The Statute 27 Eliz. c. 5, which relates to fraud against creditors, directs, 'that no act whatsoever; done to defraud a creditor or creditors, shall be of any effect against each creditor or creditors.' But then, such a construction is not to be made in respect of creditors, as will make third persons sufferers. Therefore, the Statute does not militate against any transaction, bona fide, and where there is no imagination of fraud. And so is the *Companchein*. But if the transaction be not bona fide, the circumstance of its being done for a valuable consideration, will not, alone, take it out of the Statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void."

"One case was, where there had been a decree in the Court of Chancery and a sequestration. A person, with knowledge of the decree, bought the house and goods belonging to the defendant, and gave full price for them. The Court said, 'the purchase being with a manifest view to defeat the creditor, was fraudulent; and therefore, notwithstanding a valuable consideration, void.' So, if a man knows of a judgment and execution, and with a view to defeat it, purchases the debtor's goods

Clayton et al. Brown.

it is void; because the purchase is inequitable. It is assisting one man to cheat another, which the law will never allow. There are many things which are considered circumstances of fraud. The Statute says not a word about possession; but the law says, if, after a sale of goods, the vendor continue in possession and appear as the visible owner, it is evidence of fraud, because goods pass by delivery; but it is not *sufficient* of *possession*, for that does not pass by delivery!"

"The Statute of 27 Eliz. c. 4, does not go to voluntary conveyances merely, as being voluntary, but so such as are *fraudulent*. A fair, voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man's being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, whether the act done is a bona fide transaction; or whether it is a trick and contrivance to defraud creditors."

In the subsequent case of, *Bee v. down. Watson et al. vs. Radcliffe*, (*Ib. 105,*) the Lord Chief Justice plebiscites this same principle at great length, showing, conclusively, that to make voluntary settlements void, they must be *ostensible and fraudulent*, and not voluntary only.

I have quoted thus liberally from these authorities, fearing that erroneous notions prevailed respecting this doctrine. A man may be worth millions, and sell a single slave, and get his full value; still, if the conveyance was made to hinder and delay creditors, the sale would be set aside, as to them. On the contrary, a voluntary conveyance, under certain circumstances, will be protected, even against a debt due and owing at the time of the transfer. It, in every such case, is a question of intention. The Statute, itself, makes it so. "With intent to defraud," are its words. And with this exposition of the law, and with a single additional remark, that notice, actual or constructive, has nothing to do with the factor, we shall return this case for a re-hearing.

Hargay, &c. vs. Spear, &c.

No. 42.—Wm. V. BURNEY, trustee, &c. and another, plaintiffs in error, vs. ALEXANDER SPEAR and another, defendants in error.

- [1.] Where the suit by a trustee is on account of any matter which concerns the execution of the trust, then, unless for some reason of necessity, the *testui que trust* must be made a party.
- [2.] An administrator, guardian or trustee, in Georgia, is entitled to compensation for the execution of the duties of his trust.
- [3.] As a general rule, the Courts of Chancery will not permit a trustee to encroach upon the trust fund, or to make an expenditure exceeding the income of the estate; but if, from circumstances which do not result from the fault of the trustee, there be no income or interest out of which the trustee may get compensation for his care, trouble, and attendance, in managing the fund, then he may receive payment out of the principal.

In Equity, in Muscogee Superior Court. Tried before Judge WORRILL, December, 1854.

Thomas Grant, Sr. by his will, placed Ten Thousand Dollars in the hands of trustees, for the support of his wife—the interest annually accruing thereon “to be applied to that purpose; the principal not at her control, to be given her at the discretion of the trustees—the trustees to give bond and security for the same, and their faithful discharge of said duty, and be allowed a reasonable compensation for their trouble.”

Thomas Grant, Jr. one of the trustees, took possession of the fund and paid over the interest annually, to the widow, Mrs. Martha H. Grant. At the death of Thomas Grant, Jr., the other trustee received from his administrators \$9,400—they retaining \$200 for his compensation. A bill was filed by the trustee, against the administrators, to recover this amount, and paying an account for interest made on the fund.

At the trial, on motion of defendant's Counsel, the Court ordered the bill dismissed, and Martha H. Grant, the *cestui que trust*, to be made a party complainant. This decision is the first ~~well assigned~~.

The Court charged the Jury, that a trustee ~~is compelled to~~

Burney, &c. vs. Spear, &c.

compensation, and that in this case, it should be paid out of the trust fund : and that 2½ per cent. for receiving, and the same for disbursing, and 10 per cent. on interest made, was a reasonable compensation—but that the Jury must determine the amount.

This charge is also assigned as error.

Judge BENNING, having been of Counsel, did not precede in this case.

HOLT & A. G. FOSTER, for plaintiff in error.

DUGHERTY, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The Court below decided, that the *cestui que trust*, Martha H. Grant, should be made a party, together with her trustee, to the bill which had been filed against the defendants in error ; and this decision is alleged to be erroneous.

It is a well known general rule, that all persons materially interested in the subject, should be made parties to the bill, so that the Court may be enabled to do complete justice, by deciding upon and settling the rights of all interested, and future litigation may be prevented.

Where a suit, by a trustee, is on account of any matter which concerns the execution of the trust, then the case falls within this general rule ; and unless some reason of necessity forbids it, the *cestui que trust* must be made a party. In such case, the *cestui que trust* has an immediate and material interest in the subject-matter of the suit, and it is proper he should be made a party. (*Mirk vs. Clark, Prea. in Ch. 275. Adams vs. St. Leger, 1 Bell & Heath, 181. Douglass vs. Hornfall, 2 Sim. & Stu. 184. Marin vs. Marin, 2 John C. R. 268.*) "Where a trustee is prosecuting a claim for a *cestui que trust*, the latter should be a party." (*Fish vs. Howland, 1. Knige Ch. 275.*)

Burney, &c. vs. Spear, &c.

The cases cited by the Counsel for plaintiff in error, which were supposed to oppose this rule, were all cases, we believe, without exception, where the execution of the trust, or the interests of the *cestui que trust*, were not in question.

[2.] Whatever may be the law of England on this subject, our law (the Act of 1764) settles the question, that every administrator, guardian or trustee, is entitled to compensation "for their care, trouble and attendance in the execution of their or either of their several duties and trusts;" and the Court below did not err in so deciding. (Cobb's *N. D.* 304.)

[3.] The effect of the decision below was, that the trustee might receive such compensation out of the *corpus* of the trust fund in this case.

The general rule is correctly stated, by the Counsel for the plaintiff in error. It is that Courts of Chancery will not allow a trustee to encroach upon the capital of a trust estate, nor sanction an expenditure exceeding the income of the estate.

But this rule has exceptions. If the commissions can be paid out of the income or interest of the capital, they should be so paid. Cases may occur, however, where this cannot be done, and then the commissions may be paid out of the body of the fund. Suppose a trustee is appointed for one year, to the management of a large and troublesome trust property, occupying much of his time and care: and yet, from some unavoidable cause, (not arising from fault of his) no income is produced by it during the period of his trust, and up to the time of its termination? At his settlement with the *cestui que trust*, he would certainly be allowed compensation out of the *corpus* of the fund; or there would be no remedy for his right.

This record presents a case of somewhat similar exigency. There was no fund provided by the will, specifically, out of which this compensation was to be paid. It had to be paid, then, either out of the *corpus* of the fund, or out of the interest. The answer of, Mrs. Foster, the administratrix, shows, that by the direction of the surviving trustee, Daniel Grant, (who has been removed and is now represented by William V.

Burney, &c. vs. Spear, &c.

Burney, the plaintiff in error,) her intestate, as administrator of the deceased trustee, Thomas Grant, Jr., paid out to Mrs. Martha H. Grant, one of the complainants, and the *cestui que trust*, the sum of \$1520, in interest on said trust fund, while the same was in his hands. Out of this amount, he might have reserved this claim for commissions, &c. But he was instructed by the trustee to pay it over, and he did pay it to the *cestui que trust*.

It will be remembered, that he was not acting as trustee for Mrs. Grant, but as administrator for Thomas Grant, Jr., and he paid the whole interest away by the order of the surviving trustee; feeling, perhaps, that he had no right to resist that order, or confiding in the belief that the trustee would see justice done to him. Thus, by no fault of his, there was no fund left out of which these commissions could be paid, except the *corpus* of the property. In such case, upon the principles which we have recognized, they may be paid out of the capital of the trust fund. Especially is this equitable here where the *cestui que trust*, one of the complainants, has received and enjoyed the fund in the shape of income, out of which Col. Foster might have reserved payment, and where this interest, out of which he might otherwise have reserved these commissions, was thus paid by the directions of the surviving trustee. It does not seem equitable and just, that under such circumstances, the *cestui que trust*, and the representative of that trustee, should compel him or his estate to respond to the full amount of the ten thousand dollars.

The interests of the remainder-men is another thing. This is not a proceeding by them. If they have cause, or may have cause to complain, against any one, (which we by no means decide,) it should be against that trustee by whose directions the interest was all paid out to the *cestui que trust*; and the law allowing commissions to the trustee, and payment of expenses to Col. Foster for his management of the fund, could not be carried into effect, without encroaching on the body of this fund.

These expenses are like expenses of administration, and they

Burney, &c. vs. Spear, &c.,

"must first be paid;" as this Court decided in the case of *W^{ll}. Hamson vs. Wilkins & Wife*; (14 Geo. 420,) "whether enough be left to satisfy debts and legacies or not."

Indeed; one of the answers insists that the reasonable charges, commissions, and expenses of Col. Foster in the management of this fund, while winding up the estate of his intestate, T. Grant Jr., in collecting the notes, &c. which duty Daniel Grant, the surviving trustee, insisted he should take upon himself, fully amounted to this sum, and that it was retained to meet these charges, &c. This seems to have been in the issues presented the Jury, and if we look upon that feature of the charge under consideration, as delivered *secundum subjectam materiam*, and apply it to the claim of Col. Foster, as administrator of Thomas Grant, Jr., for his services, commissions, &c., in the management of this trust fund, it is easy to see that the Court was right in holding, that under the circumstances to which we have already referred, Col. Foster's representative was entitled to the compensation out of the body of the fund.

[5.] It was not error in the Court to charge the Jury, that two and one half per cent. for receiving, the same sum for paying out, and ten per cent. on interest made, would be a reasonable compensation for the trustee. This was, in effect, no more than if he had said that such was what the law allowed; for what the law gave the trustee for services rendered, it was certainly reasonable he should have for them. And the Court would have been undoubtedly right in telling the Jury what the law did allow.

Looking to the facts of the case, and applying the charge to them, we see no good ground for complaint.

Let the judgment be affirmed.

Keaton *et al.* vs. The Governor, use of, &c.

No. 43.—BENJ. O. KEATON and others, plaintiffs in error, vs. THE GOVERNOR, for the use of Ezek. B. Stoddard, defendant in error.

[1.] Where, in the opinion of the Court, the evidence, as it appears in the record, is so slight and unsatisfactory as not to authorize the verdict, a new trial should be granted.

Debt on bond, in Dougherty Superior Court. Tried before Judge PERKINS, November Term, 1854.

This was an action against the sureties on a Sheriff's bond. The breach alleged, was a failure to levy two £. f. far. in favor of Stoddard. On the trial, the original £. f. far. issued from Baker Superior Court, were offered in evidence. Objection was made, that they having been returned to office, were papers of file, and could be proven only by exemplification of the whole record. The Court over-ruled the objection, and the sureties excepted.

The following letter from plaintiffs' Attorneys to the Sheriff, was given in evidence:

KNOXVILLE, June 10th, 1841.

"DEAR SIR: We have received \$580 of the executions Ezek. B. Stoddard vs. Wilson & Mathis, and we give Thos. Howard, of your county, control of the executions. We will be obliged to you if you will make a calculation of the balance due on the executions, in principal, interest, protest fees and costs, and take Mr. Howard's note, payable by the 1st January next, and keep it till we see you. We will satisfy you for your trouble, and see your costs paid when we meet with you.

Signed, MACON & MAY, Plffs' Att'y's."

The Court refused to charge, that this letter relieved the sureties from liability for the Sheriff's failure to levy, but charged, that if the Sheriff took Howard's note for the balance, and delivered it to plaintiffs' Attorneys, then he and his sure-

Keston et al. vs. The Governor, use of, &c.

ties, were relieved; otherwise, they were not. This charge and refusal to charge, are assigned as error.

H. MORGAN, for plaintiff in error.

R. F. LYON, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] Taking this record for our guide in this case, our opinion is, that there was not sufficient evidence before the Jury to authorize a recovery by the plaintiff.

The letter of the Attorneys authorizes the inference, that the Sheriff was justifiable in suspending the farther execution of these *s. f.s.*, and turning them over to Mr. Howard.

It is admitted for the defendant in error, that if he had so done, he would no longer have been responsible; but it is insisted, that the receipt for twenty dollars, given to him by Mr. May, the Attorney for plaintiff in execution, and bearing a date subsequent to the letter, viz: the 26th day of May, 1842, shows that the Sheriff did not turn over the *s. f.s.* to Howard, as requested, but retained possession of them, and should be held responsible for a failure to use diligence in making the money on them.

Now the receipt is dated at a period subsequent to the expiration of this Sheriff's term of office. It is shown by nothing in the case, when the payment of this twenty dollars was made to him. More than seven years elapsed after the date of the receipt, before this action was brought on the bond. Under these circumstances, we feel that the evidence, as it reaches us, without further explanation, is scarcely sufficient to show a want of diligence on the part of the Sheriff. And with the matter presented by the slight and unsatisfactory evidence before us, (which is all that we can recognize as having been before the Jury,) we hesitate to say that the Jury were justifiable in holding these securities liable! Upon such evidence, it is better that the case should go back for a new trial. In that

Reddit et al. vs. Clopton et al.

event, if the plaintiff in execution be entitled to recover, and can show it by sufficient proof, he may yet do so; and will only be postponed in such recovery; whereas the mischief may be irreparable if the judgment below is sustained.

No. 44.—Wm. A. REDD and others, plaintiffs in error, vs. DAVID CLOPTON and others, defendants in error.

[1.] The estate of an intestate dying without wife or child, or the descendants of children, and without father or mother, brother or sister, shall be distributed to and among all the cousins of the deceased equally, including those on the maternal as well as the paternal side.

In Equity, in Muscogee Superior Court. Tried before Judge WORRILL, December Term, 1854.

Martin J. Kendrick died, leaving his cousins as next of kin. On a bill for direction filed by the administrator, the Court charged the Jury, that cousins on the paternal side took in preference to and the exclusion of cousins on the maternal side.

This is the only error assigned.

Judge BENNING having been of Counsel, did not preside in this case.

INGRAM & CRAWFORD; HOLT & WELBORN, for plaintiff.
DOUGHERTY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question made before this Court is, whether, in the distribution of the estate of an intestate, who dies leaving neither wife nor child, father nor mother, brother nor sister,

Redd et al. vs. Clopton et al.

nor the representatives thereof, the cousins of the paternal, shall inherit to the exclusion of those of the maternal line?

And the answer must depend upon the construction of the Act of 1804, and the Statutes amendatory thereto.

By the Act of 1804, it is provided, that "when any person, holding real or personal estate, shall depart this life intestate, the said estate, real and personal, shall be considered as altogether of the same nature and upon the same footing. So that in case of there being a widow and child or children, they shall draw equal shares thereof, unless the widow shall prefer her dower—in which event, she shall have nothing farther out of the real estate than such dower: but shall, nevertheless, receive a child's part or share out of the personal estate. And in case any of the children shall die before the intestate, their lineal descendants shall stand in their place or stead. In case of there being a widow and no child or children, or representative of children, then the widow shall draw a moiety of the estate, and the other moiety shall go to the next of kin in equal degree, and their representatives. If no widow, the whole shall go to the child or children. If neither widow, child or children, or the legal representatives of the children, the whole shall be distributed among the next of kin, in equal degree, and their representatives: but no representation shall be admitted among collaterals, farther than the child or children of the intestate's brothers and sisters. If the father or mother be alive and a child dies intestate and without issue, such father, or mother in case the father be dead, and not otherwise, shall come in on the same footing as a brother or sister would do: provided, that such mother, after having intermarried, shall not be entitled to any part or proportion of the estate of a child who shall die intestate and without issue: but the estate of such child shall go to and be vested in the next of kin on the side of the father. And provided also, that on the death of the last child intestate and without issue, the mother shall take no part of his or her estate, but the same shall go to and be vested in like manner in the next of kin on the father's side. And in case a person dying without issue, lea-

Redd et al. vs. Clopton et al.

ying brothers and sisters of the whole and half blood, then the brothers and sisters of the whole and the half blood, in the paternal line only, shall inherit equally: but if there shall be no brother or sister, or issue of brother or sister, of the whole or half blood in the paternal line, then those of the half blood and their issue in the maternal line shall inherit. *The next of kin shall be investigated by the following rules of consanguinity, viz: children shall be nearest; parents, brothers and sisters shall be equal in respect to distribution; and cousins shall be next to them.*" (*Cobb's Digest*, 291-2.)

This act of distributions, it will be perceived, is almost a literal transcript of the English Statute of 22 and 23, *Charles II.* which was borrowed from the 118th Novel of Justinian. And it is admitted on all sides that in the distribution of personal property, both by the Civil and Common Law, the preference of males over females is superceded. To re-establish this rule of feudal origin and policy, so partial, unnatural and harsh in its principle and operation, would require language so plain that he who runs might read, and the fool and way-farer could not err therein. Do we find such terms in the Act of 1804? On the contrary, in the last clause of that Act, have not the Legislature declared in words the most unmistakable, that *cousins—all cousins—maternal as well as paternal, shall be equal and equally near to the intestate?* By what right or authority does any one dare to interpolate *paternal* into that paragraph? And yet, it must be done to make and maintain the case of the defendants in error. I am unable to discuss this point—it requires no discussion—it admits of none. And if thus palpable, under the old law, how much more so under the subsequent legislation giving to the widow the whole estate, both real and personal, of her deceased husband, dying intestate and without issue, (*Cobb's Dig.* 275); repealing that portion of the Act of 1804, prohibiting the mother from inheriting from the last child, (*Cobb's Dig.* 296); and also that provision of the Act of 1804, excluding her from inheriting from a child, after having intermarried, unless it shall be the last or only child. (*Cobb's Dig.* 296-7.)

Rept & Co. v. Dopton et al.

How true it is, that extremes in society and civilization, as in every thing else, so often meet. England and the Continental Nations of Europe manifested their preference of males to females. And the Red men of this country still adhere to this practice. Our forefathers, following the example of either one or the other, (as is not unfrequent for individuals to do among us, in the distribution of their property, even to this day,) exhibited this preference, in some respects, in the Act of 1804. Never to the extent nor in the particular instance claimed in this decision. The Acts of 1826, 1841 and 1848, to which I have referred, show a more correct, just and enlightened policy. It is, after all, exceedingly difficult to throw aside the impressions of education and habit, in favor of long established ideas. So natural and so powerful are these, that time alone can eradicate them, and cause us to realize, that a cousin on the mother's side, is and of right ought to be, equally near as a cousin on the father's side!

Col. Jones suggests, that the Act of 1804 is carefully framed, so as to prevent the next of kin of the wife from inheriting, under any circumstances, more than a moiety of the husband's property. Hence, if he died childless, she took only one half of his estate, and the other half went to his next of kin. Hence, also, she could not inherit from her last child, with whom she had previously divided the estate. And this is true. It is equally true and apparent, however, that even under that Act, to say nothing of its subsequent modification, it was contemplated that one half should ultimately go through the wife to her relatives. Now, Martin J. Kendrick having survived both father and mother, is it not clear, that to postpone his maternal cousins, would be to carry the whole estate of his father over to his kindred, and thus contravene the manifest intent of the Act of 1804? In other words, the design, even of that Act, can only be effectuated by a distribution among all the cousins?

McGlawn, Admin. &c. vs. McGlawn.

No. 45.—H. McGLAWN, administrator, &c. plaintiff in error,
vs. DAVID McGLAWN, defendant in error.

[1.] An instrument, in form of deed, and conveying a female slave, for and in consideration of the sum of five hundred dollars, to be delivered at the death of the seller, is not a testament, and therefore revocable: but is, to all intents and purposes, an absolute disposal of the remainder in the negro, after the life estate has ended.

Trover, in Chattahoochee Superior Court. Tried before Judge WORRELL, November Term, 1854.

The sole question in this case was, whether the following instrument was a deed or a testamentary paper:

GEORGIA—MUSCOGEE COUNTY:

Know all men by these presents, that J. Hardy McGlawn, of the said County of Muscogee, for and in consideration of the sum of Five Hundred Dollars, to me in hand paid, by my son, David McGlawn, the receipt whereof is hereby acknowledged, have bargained, sold and conveyed, and by these presents do bargain, sell and convey to the said David, his heirs and assigns, a certain negro girl about 13 years old, of black complexion, named Liz; to be delivered to the said David at my death, and not before. And I hereby bind my heirs, executors and administrators, to warrant and defend the right and title in and to the said negro girl, to the said David, from the claim of any person or persons whatsoever. In witness whereof, I have hereunto set my hand and seal, this the 9th day of November, 1856.

his
HARDY ✕ **McGLAWN, [L.S.]**
mark.

her
Test, **MARTHA** ✕ **POWELL**
mark.

DANIEL M. HALL.

McGraw, adm'r, &c. vs. McGraw.

This instrument was recorded upon the probate of one of the witness.

The Court below held this instrument to be a deed, and this decision is assigned as error.

HARRISON, for plaintiff in error.

STUBBS & HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[P.] This instrument is, to all intents and purposes, a sale, for a valuable consideration, (\$500) of a slave, the seller reserving to himself a life estate in the property. In other words, it is the purchase of the remainder, after the life estate has terminated. We concur with the Circuit Court, that the paper was irrevocable and not testamentary in its character.



TRIBUTE OF RESPECT TO R. S. HALL, ESQ.

SUPREME COURT OF GEORGIA,

Macon, Feb. Term, 1855.

The Committee, appointed on the occasion of the death of ROBERT S. HALL, Esq. a member of this bar, beg leave to submit through their Chairman, Judge MABET, the following report:

"Resolved, That Mr. Hall was known among us as a genuine man of education, with appreciating and cultivated taste. In respects, of genius; possessing a brilliant imagination, a clear and quick perception of the beautiful, and originating, creative faculties in a degree which entitled him to rank as one of the best thinkers of the State.

2d. That we esteem him as having been a profound lawyer. His professional acquirement was, for age of his age—being at his death, but a young man—very general, and his learning accurate and various as to enable him to compete, not unfrequently, with success, with the ablest members of this bar. As a pleader, he had but few equals. His tenacious memory, sound, discriminating judgment, industry, zeal and ardent, rapid, yet logical oratory, had placed him on a level with the first-given of his age in the profession, and warrant the belief, that had he been spared, he would have occupied its richest rewards, and attained its highest honor. He delighted in the law and studied it, not alone as the means of acquiring an income, or an preparatory to political life, but as a science in itself, productive of the purest intellectual qualification.

3d. That he was not the less remarkable for his social qualities, being frank, genial and communicative, kind and liberal

Tribute of Respect to the Memory of R. S. Hall, Esq.

in his feelings, a respectful son, an affectionate brother, and a tender husband and parent.

4th. That we deplore, in his death, a professional brother withdrawn from the honorable competition and fellowship of the law—a man of genius, stricken and prostrated when but beginning to ascend, and a lawyer who seemed to be marked and sealed for distinction.

5th. That when one who is our fellow is cut down by our side, in the pride of his intellect and the vigor of his manhood by HIM whose purposes are inscrutable and whose power is irresistible, remembering that we, too, are mortal, it becomes us to receive the warning—to be silent in awe, and with reverence to concede the sovereignty of God; and in the light of that revelation which he has vouchsafed, to prepare in life for death.

6th. That this Court and bar, as a mark of respect to the memory of our deceased brother, will wear orape on the left arm for 30 days."

On motion of Mr. Poe, Ordered that these resolutions be entered on the minutes of the Court, and that the Clerk furnish a copy to the family of the deceased.

Judge LUMPKIN responded on behalf of the Court as follows:

"During the nine years that I have been honored with a seat on this Bench, how often has the attention of this Court been arrested from its ordinary business, to the contemplation of death! Within that brief period, many of the brightest legal lights of the State have been extinguished by the icy hand of death!

"How sick the trophies gathered to the tomb the past year! DUGMIRE, CHAMBERS, JACKSON, TOWNS, HEARALD, HARRIS and GLEND are sleeping their last earthly sleep! What a brilliant constellation disappears from the professional firmament!

"How frail and fugitive is human life! *Pax tibi amico*—such was the classic commentary of Horace.—What shadowy we are—the graceful translation of Burke. Ten thousand instruments of destruction are always near, to do their fatal work! Life is a fountain fed by a thousand springs, that ger-

Tribute, &c Respect to the Memory of R. S. Hall, Esq.

inches if one be drifft! It dura silver cord, twisted with a thousand threads, that parts asunder if one be broken! It is much more strange that we escapè so long, than that we die so soon!

How early did death enter this newly formed world! How ceaseless his ravages ever since! One hundred and forty generations have already been swept away. All that tread the globe, are but a handful to the tribes that slumber in its bosom!

In the natural course of events, the thought may well have been indulged, that the respective places of the deceased and myself would have been changed, and that he might, at some future time, have been called upon to perform a kindred office for one who was so much his senior in years. But Providence has seen fit to order it otherwise. Whom the gods love they take early to themselves. Abel expected, no doubt, to bury Adam and Eve. How little did these first, fond parents, anticipate the melancholy duty of interring their murdered son.

It is a relief to the aged, bowed down under the weight of three score years and ten, to pass into the quiet slumber and tranquility of the grave. Death is comparatively of but little consequence, even to the middle aged, who are far on their way to their final repose—who have but little to hope or expect from the future, and who are already beginning to realize that they are rapidly approaching the period when they can say of most of the things of this world—“I have no pleasure in them.” Such would not be very reluctant to throw down the burden of life and rest with those who feel not its wintry storms. But to see the young man, just springing upon the arena, buoyant as the courser as he enters upon the track, cut off in the midst of his days, at the moment when we began to anticipate the full blaze of the noon, by the bright coruscations of the rising sun, well might such a spectacle suffice with sympathetic tears the cheek of the Son of God.

When the news of the death of England’s Great Statesman Duke reached this country, we looked upon it as a sure and certain consummation; and it was not his death but his life, that now before our eyes, in all its grandeur. But how different the

Tribute of Respect to the Memory of R. S. Hall, Esq.

sensation, when the Hope of the House of Commons was prematurely struck down, and the destiny of France changed for all after time! We thought of the youthful hero of Antwerp and Algeria; the popular idol of his country and felt sad that such a brilliant future was thus untimely cut off.

I will not undertake to portray the distinguished talents and virtues of our departed friend. This Bar knew him well, and its sympathies have mingled with the tears and sorrows that embalm his memory. The eloquent tribute just delivered, is heartily concurred in by the Court. We can bear our testimony to the justice of the eulogium which has just been pronounced upon the social, moral and professional qualities of the deceased. They will long be cherished with grateful satisfaction by us all. He never discussed a case that he did not give "aid and comfort" to the Court. And it is that that gives to the Court, in paying a tribute of affectionate respect to his memory, "a precious seeming to the eye." He was truly and emphatically, in this sense, entitled to the epithet of *amicus curæ*.

Robert S. Hall had a mind capable of the highest reaches of legal reasoning; and he left nothing unexplored, belonging to the subject which he discussed. He never skimmed, swallow-like, over the surface of the science, but delighted in tracing legal principles to their fountain head. And the very difficulty of the task served but to provoke his ambition.

His manner was laudanous, earnest and impressive; illuminating what was dark and obscure, as with a flash of lightning. He would pass from labyrinth to labyrinth, with a mind free from confusion and with the most unwearied energy. His logic was conceived with a cogency that bore itself onward in one continued stream of resistless argumentation. In freedom, and fulness, and fluency, his discourse resembled the Alpine stream—"Wave followed wave, nor spent its force in vain." His memory was as capacious and retentive as his judgment was sound. Like his surviving brother, it seemed impossible for him to forget any thing he ever read.

I have often sat, with all the solemnity of my other brother,

Tribute of Respect to the Memory of R. S. Hall, Esq.

and contend him contending with the best talents of the Bar, and no matter what the odds might be, in age and experience, I never entertained the least apprehension that he would be crushed in the struggle. He was one of those men whom the whole Bar and Bench of Georgia could not put down. And his assailants, instead of chronicling their attacks with the laconic, *veni, vidi, vici*, were fortunate, indeed, if they were not compelled to write, *veni, vidi, victus fui*.

O ! it was a treat to see him wrestle in the forensic fight ! Instead of skirmishing on the enemy's out-posts, he did not hesitate, for a moment, to plunge, at once, into the "imminently deadly breach ;" and if he lost his case—and what lawyer is not doomed, occasionally to the pain of disappointment ?—he never failed to sustain and advance his reputation.

ROBERT S. HALL is another living refutation of the absurd idea, that it is impossible for a man to be a fine scholar and a thorough lawyer. Who that ever lived surpassed Lord Mansfield in Jurisprudence ; and how few equalled him in general literature ? Are not the Commentaries of Sir Wm. BLACKSTONE the rich repository of the laws of England ; and are they not, at the same time, models of pure English composition ? Lord Stowell excelled almost all of his contemporaries in the law ; and yet, he was the familiar friend and literary executor of Dr. Samuel Johnson. Away with such ridiculous prejudice. Sir James McIntosh, Sir Samuel Romilly, Story, Ware, Pinckney, Legare and a long list of the brightest names in Britain and this country, give the lie to this opinion, originating in the grossest ignorance, and too often fostered by sheer envy.

But our friend has passed from among us, and he will be seen no more until "the last day." At the early age of twenty-nine, when all were looking to him with great fondness of expectation, this gifted Attorney, destined, unquestionably, to be one of the first men of the age, having already vindicated, successfully, his claim to equality with the ablest of his contemporaries, is summoned away just to wealth, and honor, and

Tribute of Respect to the Memory of R. S. Hall, Esq.

He were inviting his outstretched arm to seize the proffered prize of his high calling. The noble Arctic, with all her sail unfurled, and her pennant gaily streaming in the breeze, has gone down to an unfathomable eternity, laden with happy hopes and precious promises.

The ways of Providence are inscrutable and past finding out. We must walk by *faith* and not by *sight*. His vacant office—his vacant seat in this Temple of Justice, preach eloquently to us, that we too are born to die. Day unto day utters this solemn truth, and night unto night repeats the solemn warning. Let this thought subdue our earthly passions, and stamp with insignificance all our strifes and contentions.

To be left the widow and orphans of such a husband and brother, who can contemplate, much less calculate the loss? Let his aged parents and mourning brothers and sisters, not weep and refuse to be comforted, because the pride of their eyes and of their house is no mere, but rejoice rather, that he has lived and still lives in the bright record which he has left behind—in the Reports of this Court—in the high regard of his professional brethren—in the love of the community where he dwelt and in the memory of his social and domestic virtues.

Let the resolutions be entered on the minutes of the Court.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
FEBRUARY TERM, 1855.

Present—JOSEPH H. LUMPKIN,
EBENEZER STARNES, } Judges.
HENRY L. BENNING,

No. 46.—GEORGE R. HUNTER, administrator of Henry R. M. Stembridge, plaintiff in error, vs. JOHN STEMBRIDGE, his trustee of Sarah Stembridge, and Sarah Stembridge, defendants in error.

[A.] A ratification of part of a contract, is the ratification of the whole.

In Equity, from Crawford County. Decision by Judge POWERS.

In 1837; Thomas Stembridge made his will, and, by the third item thereof, he gave to his son, Henry R. M. Stembridge, his plantation, comprised in lot of land number twenty-six, in the third district of Houston County. By the first item of the will he said, “I allow my son Henry R. M. Stembridge to give her (wife Sarah) a support out of the plantation, during her life time.” Thos. Stembridge died, and his will was duly

Hunter, adm'r, &c. vs. Stembridge, &c.

proven. Henry R. M. Stembridge afterwards died intestate, and George R. Hunter was appointed his administrator. The widow of Henry R. M. Stembridge afterwards intermarried with one Jacob B. Nelson. John Stembridge was appointed trustee for Sarah Stembridge, the widow of Thomas Stembridge. An agreement was entered into by which Sarah Stembridge consented to relinquish her charge for support on the land, and consented that it should be sold by George R. Hunter, as administrator of Henry R. M. Stembridge, free from all such incumbrance; and in consideration thereof, Jacob B. Nelson executed his bond to deposit in the hands of said Hunter—\$200, to be applied to the support of said Sarah Stembridge; and if this fund should be exhausted before her death, he agrees to allow her the further sum of fifty dollars per annum during her life. Fifty dollars of this sum of two hundred dollars was paid by Hunter to Mrs. Stembridge. The land was accordingly sold and bought by one Morgan Hancock. Sarah Stembridge and her trustee now filed this bill, setting forth the above facts, and alleging that said Sarah was old and in her dotage, and that the contract was the result of a fraudulent combination by George R. Hunter and Jacob B. Nelson, to take advantage of her helplessness and defraud her out of her support from said land. The bill alleged, that if said Hancock was permitted to pay the purchase-money for said land to Hunter, that said Sarah Stembridge would be in danger of want in her old age and needy condition, and the provident intention of her husband would be defeated, as the said Nelson was utterly insolvent. The bill ratifies, on the part of Mrs. Sarah Stembridge, the sale of the land, by Hunter as administrator, and claims a support for her for life out of the proceeds of the sale of the land. The bill did not ask for the enforcement of the contract, but prayed that if he cancelled, and the trust for the support of Sarah Stembridge should attach upon the proceeds of the sale of the land in the hands of Morgan Hancock; and that said George R. Hunter should be enjoined from trading the notes on said Hancock.

Nelson, living in the State of Alabama, was not served; Hun-

Hunter, adm'r, &c. vs. Stembridge, &c.

ter answered the bill, and denied the charges of fraud in the procurement of the contract, and the fraudulent combination charged against him, and swore off the main equitable allegations in the bill, and alleged that the contract of Sarah Stembridge and Jacob B. Nelson, was knowingly and fairly made, and that she was entitled only according to its provisions. The answer also set up, that before said Nelson had reduced the funds to possession, he died; and that therefore, the effects being chases in action, survived to his wife; and that he had declined to pay it out to said Sarah Stembridge, on her contract with Nelson, because, if he did so, that he would be liable to pay it again, or at least, the one third portion, (the portion to which the widow of said Henry R. M. Stembridge was entitled, the other two thirds belonging to his children.)

The answer also set up a claim for certain sums in favor of said Hunter, for fees and commissions. The answer also states, that the relinquishment of Mrs. Sarah Stembridge was executed in consideration, not only of the bond aforesaid, made by Nelson, but also in consideration of an order drawn by Nelson on Hunter, by which he directed Hunter to retain out of his, N's share of the first payment for the land, one hundred and seventy-five dollars, to be applied by him, Hunter, to the support of Mrs. Sarah Stembridge, according to an obligation given by him, Nelson, to his trustee, Jno. Stembridge: The answer states that this order was read over to Jno. Stembridge, the trustee; and approved by him; that after the order was executed Hunter paid Jno. Stembridge, the complainant, twenty-five dollars under the order; that Nelson had before, through Hunter, paid complainant twenty-five dollars as part of the two hundred dollars mentioned in the bond; and thus, that at the time of Nelson's death, no more than one hundred and fifty of the two hundred dollars remained unpaid.

On the trial of the cause, the defendant (G. R. Hunter) offered to read in evidence a copy of his return to the Court of Ordinary, as administrator of H. R. M. Stembridge, deceased, and this, the Court refused to permit. Defendant also offered to prove the amount of commissions to which he was entitled,

Hunter, adm'r, &c. vs. Stembridge, &c.

as administrator of H. R. M. Stembridge, and the amount of costs and Counsel fees paid by him, on account of the litigation in this case; and the Court rejected this evidence also, and defendant excepted.

Defendant also asked the Court, in writing, to charge the Jury—1st. “That complainant is concluded by the contract with Nelson, from setting up any claim to the money in defendant's hands, if the Jury believe from the evidence, that the contract set up in complainant's bill, was made by the trustee and acquiesced in.”

2d. “That under the facts of this case, complainant is not entitled to a decree; and if so, only to the interest on the money in defendant's hands.”

The Court declined so to charge the Jury, but charged, “that complainant was entitled to recover from the administrator, whatever amount might be necessary and proper to give her a comfortable support from 1st January, 1851; aid to continue as long as she lived, or until the money in the hands of the administrator of Henry R. M. Stembridge, arising from the sale of the land, was exhausted.”

And these rulings, charge and refusals to charge, are now assigned as error.

HUNTER & BAILEY, for plaintiff in error.

COOK & MONTFORT; MILLER & HALL, for defendant in error.

By the Court.—BENNING, Jr. delivering the opinion.

Mrs. Sarah Stembridge says, in the bill that she ratifies the sale of the land.

This sale took place in pursuance of the agreement entered into by John Stembridge, her trustee, with Nelson—an agreement by which she was to relinquish her right to a support, during her life, from the land; and in lieu of that right, accept, first, the bond of Nelson, binding him to deposit with

Hunter, adm'r, &c. vs. Stembridge, &c.

Hunter, two hundred dollars, to be applied to her support, at the rate of fifty dollars a year; and also, binding him, if she should live so long as to require more than the \$200 to pay her more, at the rate of fifty dollars a year, as long as she should live. Secondly, the order of Nelson on Hunter, requiring Hunter to retain out of his, N's. share of the first payment for the land, one hundred and seventy-five dollars, to be applied by H. to her support, according to the terms of the bond.

The administrator, Hunter, acting on this agreement, sold the land free from the charge on it for the support of Mrs. Stembridge.

And it is the sale of the land thus sold, which she says she ratifies.

It appears, also, that Mrs. Stembridge actually received, under this agreement, a part of the money stipulated to be paid for her support, viz: fifty dollars—twenty-five at one time; and twenty-five at another.

Thus, then, it seems that Mrs. Stembridge has ratified parts of the agreement.

[1.] But it is a principle of law, that the ratification of a part of a contract, is the ratification of the whole. (*Wilson vs. Poulter*, 2 Story 859. *Bullen vs. Hyde*, 1 Att. 128. *And see Smith's Amer. Law*; 80. *Addison on Contracts*, 398. *Story Ag.* §250.)

It follows that Mrs. Stembridge, in ratifying parts of this contract, ratified the whole of it.

And the whole contract, then, being to be considered as binding on her, it is a consequence, that she has no rights except such as she derives from the contract.

But from the contract, she derives no right as to the proceeds of the sale of the land, except a right to have two hundred dollars of those proceeds retained in Hunter's hands for her use.

The charge of the Court below, therefore, that "complainant was entitled to recover from the administrator," Hunter, "whatever amount might be necessary and proper to give her a com-

Hunter, adm'r, &c. vs. Stembidge, &c.

portable support, from the first of January, 1851," &c. was erroneous. In no case could she have been entitled to more than \$150 besides, perhaps, interest from Hunter.

But the administrator, Hunter, in his answer, says, that Nelson died, without having reduced into his possession the proceeds of the sale of the land. And he insists, that these proceeds go to Mrs. Nelson by survivorship; and therefore, that by the death of Nelson, the order on those proceeds, made by him in favor of Mrs. Stembidge, became void.

If this statement in the answer be true, that position of Mr. Hunter, is one deserving of the most serious consideration. It is a statement, however, which seems to be without evidence—which seems not to have received the notice of the Court below, and which was not argued on authority before this Court. For this Court, therefore, to express an opinion on it, would not be proper. I may, however, indicate some sources from which arguments that bear upon it may, perhaps, be drawn: (*Bell vs. Bell*, 1 Kelly, 637. *Sayre and another vs. Flugrnoy and another*, 3^{do.} 541. *Marqueen, Hus. & Wife*, 47, 48, 55, 56, 62, '3, '4, '5, '6. *Hill on Trustees*, 415, and note 1, 416, et seq.).

So there ought to be a new trial.

Our view of the case being such as it is, it becomes unnecessary to say more than what is implied in that view, on the remaining points in the case.

I may remark, that when this case was up before, nothing was considered by this Court, but what was the import and effect of a clause in the will of Thomas Stembidge.

Cox et al. vs. The Mayor & Council Griffin.

No. 47.—PINKNEY B. COX and others, plaintiffs in error, vs.
THE MAYOR AND COUNCIL OF THE CITY OF GRIFFIN, defendants in error.

[1.] The withdrawal of a claim to real estate does not affect the right of the claimants subsequently to file a bill of injunction, praying that the Levy may be perpetually enjoined.

[2.] An Act of 1842 authorizes Judges of the Superior Courts, in their discretion, to grant a second injunction in the same case.

[3.] A ~~rescissory~~ is an open and voluntary renunciation of his suit in Court by the plaintiff.

[4.] A plea should bring forward matter which reduces the cause, or the part of it covered by the plea, to a single point. And a plea which introduces defences distinct in their natures, is bad, for duplicity.

[5.] A negative plea—that is to say, one which negatives material facts set forth in the bill, necessary to the complainant's title, and of which a discovery is sought, must be accompanied by answer.

Equity, in Spalding Superior Court. Decision by Judge Sargent, May Term, 1854.

The bill alleges, that some time previous to the month of June, in the year 1840, the Monroe Rail Road and Banking Company being then the owner of the land, laid off the plan of the present City of Griffin, then located in the County of Pike; that a map of the plan was made out, and afterwards all the lots, except certain reserved lots, were advertised and sold at public outcry; that by the advertisements, and according to the plan of the city, as laid off on the map, certain lots, named in the bill, were reserved, set apart and dedicated by the Company to religious, educational and other public purposes, and that streets and alleys and squares were reserved and set apart and dedicated for the public use and convenience; that these reservations and dedications were proclaimed or known at the sales, and the map of the city freely exhibited to purchasers, and that they greatly enhanced the value of the lots sold, and that by these means the purchasers of the city

Cox et al. vs. The Mayor & Council Griffin.

lots paid a full and valuable consideration for such reserved lots; and that by reason of these facts, and the dedication by the Monroe Rail Road and Banking Company, of these lots to various religious, educational and other public purposes, the title to said lots so reserved and dedicated, had passed out of the Company.

The bill then alleges, that long after these sales, and after the purchasers of the lots had expended large sums of money in the improvement of the city, and the lots so purchased by them, that Pinkney B. Cox, Gabriel H. Cox and Robert L. Cox obtained divers, several and joint judgment against the Monroe Rail Road and Banking Company, and had executions issued from such judgments and levied on divers of those reserved lots and squares; that these various levies were being vexatiously pressed, to the ceaseless annoyance of the owners of the lots adjoining these public lots and streets, and the municipal corporation of the City of Griffin; and the bill prayed a perpetual injunction of these levies.

To this bill the defendants filed a plea in bar, alleging that complainants had once claimed the property and had disengaged that claim; and also, had previously filed a bill of pincers in the same character, against the same defendants, and for the same purpose in the Chancery Court of Pike County, that the 10th section of the Act organizing the County of Spalding, and which was granted, requiring the complainants to remove the cause to the said County of Spalding, the county of the residence of the defendants, by the next term of the Court, or else to do the contrary; and that on failure to do so, the cause should be dismissed; "as in cases of retritio."

The cause was not removed, and at the next term, a writ of order, remitting the case, was granted, which defendant availed; amounted to a renunciation of the right of action by the complainant; and therefore, that a second injunction ought not to be granted. The plea also negatives the right of complainants to bring the suit. To this plea, the complainants demurred, and after argument, the Board below overruled the plea,

Cox, et al. vs. The Mayor & Council Griffin.

and ordered the defendants to answer; and this decision is assigned as error.

McDONALD, for plaintiff in error.

CHAPPELL, ALFORD & MOORE, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] In noticing the first point made by the plea in bar to this bill, it is only necessary to say, that the withdrawal of the claim which had been interposed by the predecessors of the defendant in error, previously to the filing of their first bill, did not affect their right to file that bill, as is insisted by the plaintiffs in error.

[2.] Nor did the dismissal of that bill, upon which injunction had been granted, deprive them of the right to obtain a second injunction. For by the Act of 1812, the issuing of a second injunction is placed expressly within the discretion of the Judge of the Superior Court.

[3.] It is next insisted by the plea, that there was an abandonment of the bill which had been filed in Pike County; "in cases of retraxit;" and therefore this bill could not be supported.

What is a retraxit? Sir Edward Coke says, that it is where the plaintiff "comes into Court and confesses that he will not prosecute his suit, but from the same withdraw himself." 4 Co. Litt. 139 a. 3 C. Pl. 477. Evans vs. McMahon, 1 A. S.

Sir William Blackstone tells us in few and simple words, that "a retraxit is an open and voluntary renunciation of his suit in Court" by the plaintiff. He adds, "and by this he loses his action."

The facts of this record all show, that neither the complainants nor their predecessors, in the solemn and formal way necessary to a retraxit, have said they are unwilling to prosecute their suit; having open and voluntarily renounced their suit.

Cox et al. vs. The Mayor & Council Griffin.

It is true, that the Judge of the Superior Court of Pike County, at April Term, 1852, granted an order nisi, directing that the papers in the cause should be returned to the Clerk of the Superior Court of Spalding County, upon payment of costs, in order for trial at May Term of said Court next; whereafter, and that in case they should not be returned as directed, that at the ensuing term of the Superior Court in Pike County, the same should be dismissed from the dockets of the Court as in cases of retraxit. But it is also true, that at that term the case was not dismissed "as in cases of retraxit," but it appears, by the record, that a general order was granted, directing "that said cause be dismissed, and the injunction be dissolved," &c.

Even if the Court had granted the order absolute, in terms of the first order, and had directed the case to be dismissed "as in cases of retraxit," this could not have made it a case of retraxit, if the complainant were not in Court voluntarily renouncing the suit. This is too plain to need further comment.

[¶ 4.] The defendants also insist, by their plea, that the complainants, as a corporation, have no right to take and hold trust estates; that they have no interest in this real estate relied upon; "are interlopers," and therefore have no right to bring this suit.

This position, if appropriate matter for a plea under different circumstances, is probably objectionable here, because, as we are inclined to think, it renders the plea, as a whole, bad for want of specificity. The office of a plea is to bring forward new matter discrediting the equity, and which reduces the cause, or the part of it covered by the plea, to a single point. (1 At. 54, May, p. 295.) But here, defendants are introduced, distinct in their characters.

However this may be, this portion of the plea is bad for another reason: If not in the nature of a demurser, which we are inclined to think it is, it is what is denominated a ~~general~~ plea—that is to say, a plea negativing material facts set forth in the bill, necessary to the complainant's title, and of which discovery is sought. In such case, it must be compensated by answer. (20 1. Ed., Pl. 672.)

Knight, next friend, vs. Hardeman *et al.* ex'rs.

The defendants' interests need not suffer by this rule; for if this feature of their defence be of any importance to them, it is easy to incorporate it with the answer.

Judgment affirmed.

No. 48.—JOHN KNIGHT, as pro. *cav.* of Margaret (a free woman of color) and others, plaintiffs in error, vs. ROBERT V. HARDEMAN and others, executors, defendants in error.

[1.] The Colonial Act of 1770, providing a mode for slaves to sue for their freedom, is of force in this State; And the several Superior Courts of this State may now perform the functions which devolved upon the General Court under that Statute.

[2.] The Acts of 1770, 1835 and 1837, afford a full, adequate and complete remedy to enable persons of color to assert their freedom. And to give jurisdiction to a Court of Equity for this purpose, a special case must be presented; and the jurisdiction is exceedingly questionable under any circumstances, no such right having been conferred by Statute.

[3.] That a Judge is privately interested in the suit, constitutes a sufficient *excuse* why he should refuse to act officially in the premises.

[4.] Under the Act of 1770, any Judge in the State may appoint a guardian *ad litem*, as contemplated by that Statute; and the authority to make the appointment, is not restricted to the Judge of the District where the suit is to be brought.

[5.] Because, by the laws of Maryland, a testator may free his slaves when they attain to a certain age, is it incumbent upon the Courts of Georgia, or have they the right, in the face of our own Legislation against domestic manumission, to execute a will containing an emancipation clause, to the foregoing effect? *Ques.*

*In Equity, in Bibb Superior Court. Decision by Judge Powers, May Term, 1854.

*In 1822, Henry Duvall, a citizen of Maryland, made his last will and testament, one item of which was as follows: "It is my will that my Negroes never shall be freed after the 25

Knight, next friend, vs. Hardeman et al. ex'ra.

day of January, 1828; and all her issue to be free as they arrive at the age of 30 years; and all or any of my young blacks that are not manumitted, shall be free as they arrive at the age of thirty years. Margaret, (one of the complainants and the mother of the others,) was the daughter of Rebecca, and "a young black" at the time of testator's death. She arrived at 30 years of age in 1835. By some means, before reaching that age, she was sent from Maryland into Georgia; and sold from one to another until bought by one Michael J. Healey. He died, leaving Robert V. Hardeman and the other defendants in error, the executors of his will. These executors were about to sell said Margaret and her children. This bill was filed by Knights as their next friend, alleging the foregoing facts; and farther, that he had applied to said Hardeman, the Judge of the Circuit where Margaret was domiciled, to be appointed guardian for these negroes, and he had refused so to appoint him; that he had appealed to the Supreme Court from this decision, but the negroes would be sold before a decision could be had; that a suit at law would not protect them. 1st. Because all the witnesses are residents in Maryland, and their testimony could not be procured before the sale. 2d. Because they would be sold and removed from the State before a hearing could be had. The prayer was for an injunction and a decree, declaring complainants free. A general demurser was sustained and the bill dismissed. This decision is assigned as error.

STUBBS & HILL, for plaintiff.

MCDONALD, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

This was a bill filed by complainants, to enjoin their issue as slaves, and to establish their freedom. They are negroes. The bill was demurred to generally; the demurser was sustained and the bill dismissed. The judgment of the Court in the demurser is alleged, by attorney, with challenges that his

Knight, next friend, vs. Hardeman et al., ex'rs.

garet Phillips wife; on the 5th day of June, 1822, the property of Henry Duvall, and daughter of Rebecca Phillips, who was the property of said Duvall. 2. Duvall, on that day and year, made and published his will; by which he declared that his negro woman Rebecca should be free on the 1st January, 1828, and her issue to be free as they arrived at the age of 30. 3. That Margaret is the daughter of Rebecca, and attained the age of 36 in 1855. 4. That Duvall was, at the time of his death, domiciled in Maryland; and that his will was in strict accordance with the laws of that State; and that the executor ought to have carried it out. 5. By act, contrivance or fraud, she was sent off to Georgia; and after having been repeatedly sold as a slave, in the year 1840, or thereabouts, she was purchased by Michael McHealy, who departed this life in 1850, after having made a will appointing Hardeman and Moreland, then and now of Jones County, and McCarthy, now of Bibb County, his executors. 6. Executors qualified and became possessed of Margaret and her children; and having obtained leave to sell them, will sell them on the first day of January next ensuing, before the court-house door, in Jones County, unless restrained by the equitable interposition of the Court. 7. That Knight had applied to the Honorable Robert V. Hardeman, Judge of the Superior Courts of Jones County, to be appointed guardian of said woman and children, which he refused to do; and to which decision he excepted, and will carry it to the Supreme Court by writ of error; and before a decision will be made on said writ of error, the negroes will be sold and removed beyond the limits of the State. 8. If it were in his power to sue at Law for their freedom, the negroes would be sold and removed beyond the limits of the State, unless defendants are prevented from selling them. 9. He has no remedy at Law, because his witness to prove the identity of the negroes, reside in Maryland; and their attendance cannot be procured before the time appointed for the sale, because Hardeman, defendant, is the Judge assigned to and the referee to appoint Knight, next friend, &c. of the negroes; guardian; whose decision was excepted to, and

Knight, next friend, vs. Hardeman et al. et al.

before a decision can be had, the said negroes will be sold and removed out of the State. 10. Sets forth the value of his and the length of time the negroes were in possession of the deceased and of his executors. 11. The bill prays that their freedom may be established, and an account taken of the hire, a guardian appointed; and the sale perpetually enjoined. This is an epitome of the bill.

Is there equity in the bill?

[1.] Waiving several of the technical objections to the sustainability of the bill, as discussed by Governor McDonald, has not the party, in this case, an ample remedy at law? And, does he assign any sufficient reason for not resorting to that forum?

The first Act upon this subject is the Provincial Statute of 1770, (*Cobb's Digest*, 971.) By the 1st section of this Statute, it is enacted—“That all negroes, Indians, mulattoes or mestizos, who now are or shall hereafter be in this Province, free Indians in amity with this Government, and negroes, mulattoes or mestizos, who now are or hereafter shall become free, excepted,) and all their issue and offspring, born or to be born, shall be, and they are hereby declared to be, and remain forever hereafter, absolute slaves, and shall follow the condition of the mother, and shall be taken and deemed, in law, to be chattels, personal, in the hands of their respective masters or possessors, and their executors, administrators and assigns, to all intents and purposes whatsoever. Provided, always, that if any person or persons whatsoever, on behalf of any negro, Indian, mulatto or mestizo, do apply to the Chief Justice or Justices of his Majesty's General Court, by petition, after sending the notice of said Court, or before the Chief Justice or any of the Justices of the same Court, at any time in due season, the said Chief Justice or any of the said Justices shall be, and be and they are hereby empowered, to admit any such person, so applying, to be guardian, for any negro, Indian, mulatto or mestizo, claiming him as her freedman and such guardian shall be enabled, entitled and capable, in Law, to bring an action of trespass in the name of his ward.

Knight, next friend, *vs.* Hardeman *& al.* ex'rs.

of ward, against any person or persons who shall claim property in or shall be in possession of any such negro, Indian, mulatto or mestizoe ; and the defendant or defendants shall and may plead the general issue on such action brought, and the special matter may and shall be given in evidence. And upon general or special verdict found, judgment shall be given according to the very right of the cause, without having any regard to any defect in the proceedings, either in form or substance ; and if judgment shall be given for the plaintiff, a special entry shall be made declaring that the ward of the plaintiff is free ; and the Jury shall assess the damages which the plaintiff's ward hath sustained ; and the Court shall give judgment and award execution against the defendant for such damages, with full costs of suit : but in case judgment shall be given for the defendant, the said Court is hereby fully empowered to inflict such corporeal punishment, not extending to life or limb, on the ward of the plaintiff, as they in their discretion shall think fit : *Provided, always,* that in any action or suit to be brought in pursuance of the direction of this Act, the burden of the proof shall lie on the plaintiff ; and it shall always be presumed that every negro, Indian, mulatto or mestizoe, (except as before excepted) is a slave, unless the contrary can be made appear.

Section II. "In any action or suit to be brought by any such guardian as aforesaid, appointed pursuant to the direction of this Act, the defendant shall enter into a recognizance with one or more sufficient sureties to the plaintiff, in such sum as the said General Court shall direct, with the condition that he shall produce the ward of the plaintiff at all times, when required by the Court, unless such defendant shall prove, upon oath, to the satisfaction of the said Court, his inability to produce such ward ; and that while such action or suit shall be pending and undetermined, the ward of the plaintiff shall not be abused or misused."

Is this Act of force in this State ?

It was adopted, according to the express terms of the Act of

Knight, next friend, vs. Hardeman et al. ex'rs.

1784; it is contained in every Digest that has been made of the Laws; it was the only law regulating suits for freedom up to 1835; it is known to some of us that proceedings were instituted under it; there is nothing in the subsequent Acts of 1835 and 1837 which, directly or by necessary implication, repeals the Act of 1770; it is the only Act which provides for Indians, mulattoes and mestizoes; the Statutes of 1835 and 1837 being applicable to negroes only. Our conclusion therefore is, that this Act is of force.

The next inquiry is, what tribunal shall perform the functions which devolved upon the General Court, as it was called, under the Provincial Act of 1770? Undoubtedly our Superior Courts. All of our legislation recognizes the fact that the powers exercised by the old Court passed, *sub silentio*, into the several Superior Courts when the State Government was organized; and the Judicial powers were distributed amongst the different Courts. The law regulating the partitioning of land is a notable instance of this transition. The Provincial Statute upon this subject was enacted as early as 1767. It recites, that it was inconvenient, in this Province, to pursue the method of dividing lands and tenements by writ of partition, as practised in Great Britain; and that it was necessary to provide a more easy and less expensive manner of obtaining partitions. It, therefore, empowers the "*General Court of Pleas*" to grant writs of partition, &c. And thus, from 1767, three years before the Slavery Act of 1770 was passed, down to 1827, the jurisdiction of the "*General Court of Pleas*" was exercised by our Circuit Courts, without any express authority to that effect. And what is a little remarkable, the Act of 1827, to cut down the number of partitioners from eleven to five free-holders, recites, in the preamble, that "whereas, by the Act of 1767, it was made the duty of the '*Superior Courts*' in this State, &c. when in truth the *Superior Courts*, as such, had no existence, except in its prototype and predecessor, the *General Court of Pleas*." (See *Cobb's Digest*, 581, 2, 3.)

Much is, after all, assumed and understood in the legislation of a people, as in every thing else, otherwise our own system.

Knight, next friend, *ss.* Hardeman *et al.* ex'rs.

will be found, upon close scrutiny, to be lamentably defective.

[2.] Let us, next, examine cursorily the Acts of 1835 and 1837. By the former it is declared, "That it shall and may be lawful for any Justice of the Inferior Court of any county of this State, upon the complaint of any free person of color, that he, she or they are fraudulently or illegally held in slavery, to make due inquiry into all the circumstances of the case; and if, upon such examination, the Justice shall be satisfied that there is probable ground to believe that such complainant or complainants are improperly and illegally held in a state of slavery, it shall be his duty to order such person or persons into the custody of the Sheriff of the county until the pretended owner or owners shall enter into bonds, with good security, for double the value of such person or persons of color not to remove or attempt to remove such free persons of color from the county where this examination is held, before the cause is finally adjudicated; whereupon, it shall be the duty of the Sheriff to deliver such persons of color to such pretended owner: but if the persons claiming to be the owners or proprietors of such person or persons shall fail or refuse to give bond and security as aforesaid, the Sheriff shall retain him, her or them in his possession."

Sec. II. "It shall be the duty of the Justice of the Inferior Court, before whom the examination is had, to reduce the statement to writing, and to return the same to the Clerk of the Inferior Court of the county, who shall docket the case, stating the names of the parties, &c. which shall stand for trial the first Court after the same is docketed, unless either party, for want of evidence, or other sufficient cause, should move to continue the cause, which may be done for one term and no longer."

Sec. III. "The Inferior Court shall cause the parties to make up an issue involving the complainant's right to freedom, which shall be submitted to a Jury as in other cases: but either party being dissatisfied with the verdict, shall be permitted to appeal to the Superior Court, without giving bond and security, as in other cases."

Knight, next friend, vs. Hardeman *et al.* ex'rs.

Sec. IV. "Should the complainant, upon the final trial of the case, succeed in obtaining a verdict in his favor, the Court shall order such person of color to be set at liberty and a guardian to be appointed, as is now regulated by law." (*Cobb's Digest*, 1007.)

This Act, it will be seen, contemplates a proceeding to be instituted at the instance of the colored person. By the Act of 1837, provision is made, that "upon the complaint of any free white person, upon oath, showing that he has good reason to believe and does believe that any person or persons of color are free and are fraudulently held in slavery," it is made the duty of any Justice of the Inferior Court of any county of this State, to issue his warrant, directed to the Sheriff or any lawful constable, to arrest the holder as well as the slave, and to cause both to be brought before him, that due inquiry may be had into all the circumstances of the case; and if, upon such examination, the said Justice shall be satisfied that there is probable ground to believe that such persons of color are improperly held in a state of slavery, to require the person so detaining them to enter into bond, with sufficient security, payable to the party making the affidavit as the *prochein ami* of the slave, conditioned for the delivery of the slave, in obedience to the mandate of the Court, to abide its final order, and that said colored person shall not be removed beyond the limits of the State in the meantime; and on failure to do so, the person of color is to be delivered to the complainant to the like effect, &c. (*Cobb's Digest*, 1011.)

[3.] Without dwelling longer upon the provisions of these several Acts, do they not, singly or combined, afford the most full and complete remedy, to enable persons of color to assert their freedom? What then are the special facts set forth in this bill, to give jurisdiction to Chancery? They are, First, That Judge Hardeman, who is one of the executors of Healey's will, refused to appoint the plaintiff in error guardian; and Secondly, That owing to the non-residence of the witnesses, by whom the identity of these people could alone be proved, &c.

Knight, next friend, vs. Hardeman *et al.* ex'rs.

complainant could not procure their testimony in time to prevent the sale in January next ensuing the application.

[4.] As to the complaint against Judge Hardeman, why did Knight apply to him? why call upon him to prejudice the estate of his testator, which, by previous and consequently paramount obligation, he was bound to protect, by sanctioning this proceeding? So far from the refusal of Judge Hardeman to act officially in the premises, on account of his interest, furnishing any ground of complaint or pretext for a change of jurisdiction, it constituted a good and sufficient excuse why he should not act, and the complainant can take no advantage of his doing so. Why go to Judge Hardeman? One of the executors, McCarthy, resided in Bibb County—why was not the application for guardianship made to the Judge of the Macon, instead of the Ocmulgee Circuit? It was he who sanctioned this bill of injunction on account of the interest of Judge Hardeman. Why call upon Judge Powers to perform this service and not the other? Indeed, according to our construction of the Act of 1770, (which is admirably adapted to proceedings of this sort, and which, ordinarily, will be found to be a better working Statute than either of its successors) the mere preliminary proceeding of appointing a guardian, might have been discharged by *any* Judge of the Superior Courts of the State.

And as to the other ground of equity, to wit: the inability of the complainant to procure the attendance of the Maryland witnesses to establish the identity of Margaret Phillips and her descendants, in time to prevent the sale, there is no averment in the bill that the attendance of these witnesses was expected at any future time. The Courts have no power to coerce their attendance, living in another jurisdiction. But waiving this objection, we say that under each of the Acts already cited, abundant provision is made for protecting persons of color from being eloined or removed beyond the jurisdiction of the State before a trial can be had. And a resort to this, would have prevented all the mischief apprehended from the approaching sale.

Decisions have been read from Virginia, Tennessee and sev-

Knight, next friend, vs. Hardeman *et al.* ex'res.

eral other of the slave or *quasi* slave States, to the effect, that in suits for freedom, the jurisdiction of Chancery is not ousted by the enactment of Statutes for this purpose. I shall be pardoned, I trust, the apparent presumption in suggesting that questions involving slavery, have not, heretofore, been discussed, even in the slave States, with that thoroughness which either principle or their intrinsic importance demanded. The Courts as well as the country, are just waking up to a proper appreciation of their momentous duties and responsibilities in this respect. For ourselves, we are strongly inclined to hold the very converse of the doctrine referred to from our sister States to be true, namely: that the Courts, themselves, can only move in this matter, in the course indicated by the express legislation of the State; and that where the law stops their jurisdiction stops. We speak, of course, in relation to domestic and not to extra-territorial emancipation. The bill before us does not involve the latter question. This whole question is one of State policy, and should not be put upon these principles of *meum et tuum*, which regulate individual rights. At any rate, before yielding to the claim of jurisdiction here set up, a very strong case must be shown for the interposition of a Court of Chancery.

As to the position that a *bona fide* purchaser should be protected, inasmuch as these people failed to give notice of their claim to freedom at the time they were sold, we attach no importance to that. It would be preposterous and unjust to visit such consequences upon persons in their condition.

[5.] I must be pardoned for suggesting, that to my mind, there lies, at the foundation of this case, a much stronger objection to this whole proceeding, than any which have been discussed by the learned Counsel. And that is, the want of equity in the bill, not because the complainants have ample redress at *Law*, if any where; but because neither Courts of Law nor of Equity have any right to grant the relief which they seek.

We have, in this State, the most stringent Statutes which the ingenuity of our wisest statesmen could devise, to prevent

Gresham, Ordinary, &c. vs. Pyron.

domestic manumission. For fifty years, the policy of our legislation has manifested no variableness nor shadow of turning in this respect. Can the laws of a sister State, then, allowing the freedom of these slaves, be executed by the Courts of Georgia? Dare we say, in the face of the Acts of 1801 and 1818, that these foreign laws are not prejudicial to our own rights and interests? Are we not under paramount obligation to enforce our own policy?

To my mind, this is a plain case.

No one pretends that negroes can be carried to New York or any other free State, and held there in perpetual bondage by their owner, in defiance of the laws and policy of that State. With what more propriety can slaves be brought here and emancipated? Such a doctrine is wholly inadmissible. It might be used to subvert the domestic institutions of every slave State in the Union. Our Courts of Justice are powerless to exercise an authority so repugnant to the declared will of their own Government.

But I forbear to discuss this point, inasmuch as the decision below may be sustained upon the other ground.

No. 49.—DAVIS C. GRESHAM, Ordinary, &c. plaintiff in error,
vs. LEWIS PYRON, defendant in error.

- [1.] An appeal lies from a refusal of the Ordinary to grant letters *pendente lite*.
- [2.] By the amendment of the Constitution, creating the office of Ordinary, that officer is authorized to grant temporary letters, "to hold until permanent letters are granted." Where there is an appeal from grant of permanent letters, the temporary administrator will continue in office until that appeal be disposed of, and permanent letters granted.
- [3.] Where an Ordinary refuses to enter an appeal from his decision declining to grant letters *pendente lite*, *Mandamus* is the proper remedy.

Gresham, Ordinary, &c. vs. Pyron.

Motion, in Meriwether Superior Court. Decision by Judge
STARKS, August Term, 1854.

Lewis Pyron, claiming to be a creditor of Jacob Stroman, deceased, obtained temporary letters of administration upon his estate. He and William Mitchell, (who also was a creditor,) both advertised for permanent letters. At the hearing, the Ordinary granted the letters to William Mitchell and revoked the temporary letters to Pyron, as having expired by their own limitation—Pyron making no objection thereto within four days. Pyron appealed from the grant of permanent letters to Mitchell. Letters *pendente lite* were then granted to Mitchell. From the grant of letters *pendente lite*, Pyron offered to appeal also. The Ordinary refused to grant an appeal from this grant of letters. Pyron moved a rule *vs.* the Ordinary in the Superior Court, to show cause why he should not enter the appeal, *nunc pro tunc*. This rule was resisted—1st. Because the proper mode to proceed was by *mandamus*. 2nd. Because, upon the above facts stated by the Ordinary, in his return to the rule, an appeal did not lie.

The Court over-ruled the objections, and made the rule absolute; and this decision is assigned as error.

B. HILL and E. Y. HILL, for plaintiff in error.

H. WARNER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] It is insisted, that the Ordinary was right in refusing this appeal, because it was proposed to be taken from a decision declining to grant letters of administration *pendente lite*. The law authorizes an appeal from “any decision” of the Ordinary. It is impossible to say that this is not a *decision*. There can be no reason given why it is not as much a *decision* as the refusal of permanent letters.

The only reason assigned why there is a difference was, that

Gresham, Ordinary, &c. vs. Pyron.

If appeals from a refusal to grant letters, pending the appeal from a grant of permanent letters, were allowed, it would be productive of great inconvenience, as there would then be no one to take charge of and manage the estate. This does not necessarily follow, for the Ordinary might appoint, again, some one as temporary administrator, pending the last appeal, and so on until an administrator was found.

If it be answered, that this might not be practicable, as the appeal from the refusal to grant letters *pendente lite* might not be entered until Court had adjourned, the reply to that is, that this observation applies as well to the appeal in the first instance; and in such case, the supposed inconvenience would not be obviated; for letters *pendente* could not be granted out of the term, as the law requires them to be granted by the Court.

But it is well known that the *argumentum ab inconvenienti* is legitimate only where the Court is doubtful as to the law. Where that is clear, the Judge must administer it; whatever the inconvenience.

The Ordinary, however, in such a case as that supposed, has a general authority in the premises, by which he can, to a great extent, remedy such an inconvenience.

[2.] The inconvenience in question need not arise again, for another reason. By the amendment of the Constitution creating the office of Ordinary, that officer is empowered to, "grant temporary letters of administration, to hold until permanent letters are granted." When, therefore, a temporary administrator is appointed, he may retain his office until the appeal from grant of permanent letters, is finally tried and determined, and these letters are granted. In this case, Lewis Pyron, the temporary administrator, might have continued (in our opinion) to exercise his authority until the appeal was disposed of, if he had not acquiesced in the revocation of his temporary letters.

We are well satisfied, that the defendant in error was entitled to his appeal.

Gresham, Ordinary, &c. vs. Pyron.

[3.] Let us now ascertain, whether or not he has pursued the proper remedy to secure it. Can an Inferior Judicature in this State be reached, and its errors, or its refusal to administer the law, be corrected by a proceeding in the form of a rule issued by the Superior Court?

By our system, what are technically known as *errors of Inferior Courts*, committed *Judicially* in the administration of Justice, must be corrected by the Superior Court, either by appeal or by *certiorari*. And the errors which are to be thus corrected, are such as occur after a case of some sort is before the Inferior tribunal. But here the complaint is, that the Ordinary would not permit the case to get its judgment in Court. He refused to allow an appeal; he refused to do that ministerial act necessary to give the party desiring to appeal a standing in Court, and to which he was entitled as matter of right.

It was not a judicial error to be corrected, but a ministerial act to be performed by the Ordinary, which he refused, and thereby occasioned a failure of justice.

To correct a failure of justice by reason of such refusal, *mandamus* is the proper remedy in our opinion.

It was urged, that as the defendant in error was entitled to appeal, as matter of right, the Superior Court might order such appeal *nunc pro tunc*. This is true; but it must be done by the proper remedy.

We do not see that this case differs, in principle, from that where the Clerk of the Superior Court refuses to send up a bill of exceptions to this Court, after there has been a compliance with the law; or where that Clerk refuses to receive a petition and annex process. They stand upon the same basis of reason.

The decisions cited by the Counsel for the defendant in error, are all cases where the cause had a judgment in Court; where the ministerial act necessary to place the case there had been performed; but there was some irregularity or informality in the proceeding.

Let the judgment be reversed.

Wellborn vs. Weaver et al.

No. 50.—C. T. WELLBORN, plaintiff in error, vs. W. W. WEAVER and others, defendants.

- [1.] A new trial will not be granted because the verdict of the Jury is contrary to the charge of the Court, if the verdict be according to law, and the charge against it.
- [2.] To make the saving in the Statute of Limitations, in favor of *feme sole* available, they must be actually married at the time the right of action accrues.
- [3.] Marriage may be postponed, but not the Statute of Limitations.
- [4.] If negroes, belonging to a *feme sole*, are converted before marriage, the law transfers the property and right of possession to the husband; and he, alone, must sue.
- [5.] A deed, signed, sealed and delivered to a third person, *as the agent of the grantor*, to be returnd and kept by him till the death of the grantor, and then to be delivered to the grantees, is not the present deed of the grantor; neither is it an *escrow*, but a testamentary paper, and must be proved as such before title to personal property can be derived under it.
- [6.] *Wheelright vs. Wheelright*, (2 Mass. R. 417,) examined and disapproved.
- [7.] A deed takes effect from delivery, which may be by words, or by acts without words; and to the grantees or to a third person, without especial authority from the grantee to receive the same.
- [8.] It is not essential to the delivery of a deed, that the grantees be present, personally, to accept the same.
- [9.] The mere retention of a deed by the grantor, will not affect its validity, unless agreed and understood, at the time, that the deed is not to pass out of the grantor's possession.
- [10.] A naked power, uncoupled with an interest, is determined by the death of the principal.
- [11.] Delivery is no less essential to an *escrow* than a deed.
- [12.] Distinction between a deed and an *escrow*.
- [13.] The act of registering a deed does not amount, necessarily, to a delivery, when placed on record by the grantor or by his direction, it is only *prima facie* evidence of delivery, and may be explained or rebutted.
- [14.] Whether an instrument be a deed or a will, does not depend upon its form or manner of execution, but upon its operation.
- [15.] The intention of the maker may be ascertained, not only from the instrument itself, but from extrinsic evidence.

Trover, in Coweta Superior Court. Tried before Judge WARNER, September Term, 1854.

Wellborn *vs.* Weaver *et al.*

This was an action to recover two negroes, a woman and her son, brought by the plaintiffs, children of the wife of defendant by a former marriage, against C. T. Wellborn.

The negroes had formerly been the property of Joshua Elder, deceased. He delivered them to his daughter Sarah, on her marriage with one Seaborn B. Garnett, the father of plaintiffs. As to whether she took them as a loan or gift, there was much conflicting testimony. The negroes remained in her possession until after Garnett's death, and until within a few days of Mrs. Garnett's marriage to Wellborn, the defendant, which was in 1838, when they were taken away from her by Joshua Elder. In 1842, Joshua Elder executed a deed of gift, in the usual form, conveying the negroes to the plaintiffs. This deed he gave to one of the subscribing witnesses, with instructions to have it recorded and to hold it as his, Elder's agent, until he, Elder, should be dead, and then to deliver it to the donees; which the person to whom it was intrusted did, as directed. This deed and the circumstances of its delivery were in evidence.

The negroes continued in the possession of Joshua Elder until 1850, when he sent the negro woman to defendant's, to wait on his, defendant's, wife; and the boy afterwards ran away and went to defendant's who refused to give him up. Joshua Elder died in 1851, and this suit was instituted by the children of defendant's wife, the donees in the deed above mentioned, to recover the property, and the facts aforesaid appeared in evidence. The Jury found a verdict for the plaintiffs; whereupon, defendant moved for a new trial, stating in his rule the following grounds: 1st. Because the verdict is contrary to the evidence and the charge of the Court, the Court having charged the Jury, among other things, that if they believed from the evidence, that Joshua Elder had given the property in dispute to Mrs. Garnett, afterwards Mrs. Wellborn, before her marriage with defendant; and that said Elder took possession of the said property, on the day of the marriage, or so shortly before that there was not a sufficient reasonable time for Mrs.

Wellborn vs. Weaver et al.

Garnett (now Mrs. Wellborn) to have instituted suit in her own sight against said Elder, before her marriage with defendant, for said property; that in that case, the Statute of Limitations would not commence to run against the rights of Mrs. Garnett, (now Mrs. Wellborn); as before stated, the property being in her own right, and she being a *feme covert*, the Statute would not run during her coverture.

2d. And further contrary to the charge of the Court and the evidence in this: the Court having charged the Jury, among other things, that if they should be of the opinion, from the evidence, that it was a gift from Elder to Mrs. Garnett (now Mrs. Wellborn) as before stated; and also, that the Statute of Limitations did commence to run against the rights of Mrs. Garnett (afterwards Mrs. Wellborn) when Elder took possession of the property in 1888; that they should find for the defendant, unless they should be of the opinion, further, from the evidence, that Elder had had the possession of the property, and held the same adversely to the rights of Mrs. Garnett, afterwards Mrs. Wellborn, for four years before he conveyed the same to the plaintiffs.

3d. Because the Court erred in refusing to charge the Jury, that the paper which was relied on by plaintiffs as title in them, was testamentary in its character and effect, and could not be proof of title in plaintiffs, without first being proven in the Court of Ordinary, according to law.

4th. Because the Court erred in charging the Jury, that the said paper was not testamentary under the evidence adduced in this case, and in order to make it so, it must appear to be such from the paper itself.

5th. Because the Court erred in admitting the evidence of Asa Chandler and others, to prove the declarations of Elder before the making the deed to plaintiffs, said evidence being objected to by defendant's Counsel, at the time it was offered and admitted by the Court; the declarations being made while in possession of the property and exercising acts of ownership over it, showing title in himself.

Wellborn *vs.* Weaver *et al.*

Which motion for a new trial was over-ruled by the Court; and on this decision error is assigned.

SIMS & HAMMOND; BUCHANAN, for plaintiff.

DOYAL; SPEER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] A new trial will not be granted, because the verdict of the Jury is contrary to the charge of the Court, provided the verdict is according to law and the charge is against it.

[2.] Now we are clear that the saving in the Statute of Limitations in favor of *feme coverts*, does not apply where the *feme* was *dis-covert* at the time her right of action accrued, notwithstanding she may have married, subsequently, on the same day.

[3.] In other words, *marriage* may be postponed, but not the Statute of Limitations. And then the Act of 1817, (*Cobb's Digest*, 587,) which stops the running of the Statute as to idiots, lunatics and infants, does not extend to married women, notwithstanding the intervening disability of *coverture*.

[4.] Moreover, the negroes in dispute were taken possession of by Joshua Elder before the marriage of his daughter, Mrs. Garnett, with Wellborn, the defendant; and that being so, the better opinion is, not only that Wellborn *might* have sued alone, but that he *must* have done so. And the reason assigned is, because the law transfers the property to him, and the wife had no interest in it. (See 1 *Chitty's Blackstone*, note, p. 360. *Bacon's Abr. Title Distrin.*, A. *Buller's New Pius*, 50. 1 *Salt.* 164. *Sed. Contra. Reports Tem.* p. *Harder*, 120.)

If this be so, not only did the Statute of Limitations begin to run against the wife *deem sola* and continued, albeit the intervening *coverture*; but it commenced to run against the husband also, from the time of the marriage, which makes the

Wellborn vs. Weaver et al.

Statutory title of Joshua Elder and those claiming under him complete.

[5.] What is the true character of the paper executed by Joshua Elder to his grand-children? Is it a deed or a testament? There is a conflict of authority upon this point; and our opinion has not been formed without some hesitancy.

[6.] The Circuit Court held that it was a deed, and the current of American cases is certainly with the decision. *Wheelwright vs. Wheelwright*, 2 Mass R. 447, is the leading authority on that side, and has been cited and followed as law, without questioning, in all the subsequent adjudications. It was an application for partition. The petitioners produced, in support of their claim, two deeds purporting to be conveyances of the premises; and the dispute was, whether or not the circumstances attending their execution amounted to a *delivery*, which it was admitted was essential to their operation. The evidence was this: Nathaniel Wells, Esq. testified, that in the year 1795, Joseph Wheelwright, one of the petitioners, requested him, by direction from his father, *as he said*, to write these two deeds; that having written them, the father called upon him and signed and sealed the two deeds in the presence of the witnesses and his brother, since deceased, and delivered them to him for the use of the grantees; that it was the intent of the parties that the grantor should have the use of the premises during his life; and as some of the grantees were minors, and could not secure the use to him, the deeds were delivered as *escrows*, as he expressed it, to be delivered, by him, to the grantees, upon the death of the grantor, which the witness had accordingly done.

Upon this proof, Chief Justice Parsons conceded that the objection, that the testimony did not sufficiently show that these deeds were delivered by the grantor, in his life time, to the grantees or any person authorized by them to receive the same, deserved much consideration. Still, he held the law to be well settled, that if the grantor deliver any writing, as his deed, to a third person, to be delivered over, by him, to the grantees, on some future event, it is the grantees' deed present-

Wellborn *vs.* Weaver *et al.*

ly, and the third person is the trustee of it for the grantee. And in support of this conclusion, the learned Chief Justice refers to *Perkins*, 143-'4, and *Bushell vs. Pasmore*, (6 *Modern*, 217-'8.)

I would merely remark, that in all the cases quoted, the papers were delivered, confessedly, as *escrows*.

In the second edition of the *Massachusetts Reports*, the propriety of this opinion is doubted, in the indest form of a *Quere* appended in a note to the case; by the editor, Mr. Hand:

[7.] Can it be sustained upon principle? We do not controvert the doctrine, that all such acts as give estates directly or by way of use, are good at first, and that the thing granted, when the deed of grant is delivered to the grantee's use, shall vest in the grantee before he has notice of the grant, or agree to accept of the thing granted; so that, if lands be granted immediately, by feoffment, gift, &c. the thing granted shall be said to be in the grantee, and the grant good before notice or agreement, until disagreement. (*Shep. Touch.* 285. 2 *Ven-
tris*, 198. *Shoner*, 808.) That every man is presumed to assent to a grant made for his benefit. (1 *Bonn.* 502-'3, and 518, 520.) That while it is true that a deed takes effect from the delivery, which may be by words without act, or by acts without words; that such delivery may be either to the grantee or to a third person, who has no special authority, for the use of the grantee. (*Shep. Touch.* 57 and 58. *Cowper's R.* 204. 12 *Johns.* 536. 1 *N. H. R.* 357.)

[8.] And farther, that it is not essential to the valid delivery of a deed, that the grantee be present and that it be accepted by him, personally. (12 *Johns.* 536. 12 *Mass. R.* 460: 17 *do.* 220. 9 *do.* 310. *Shep. Touch.* 58.)

[9.] Moreover, we admit that the mere retention of the deed by the grantor, of itself, will not affect its validity, unless it be declared or understood, at the time of its execution, that the deed is not to pass out of the possession of the grantor. (2 *Bro. Wms.* 360. 1 *P. Wms.* 577. 2 *ditts* 358. *Pre. on Chancery*, 122. 2 *Vernon*, 473. 1 *Bro. Par. Cas.* 122. 1 *Vern.* 316.) Still, the inquiry remains, does the delivery of the deed

Wellborn *vs.* Weaver *et al.*

deed, to a third person, as the agent of the grantor, to hold during the life of the grantor, and to be delivered at his death to the grantees, operate as the deed of the grantor *presently*?

It is clear, from the testimony, that William B. Brown, to whom the paper was delivered, was not the agent of both parties, much less the trustee for the use of the grantees, which Wells, the witness, was assumed to have been by the proof in the case of *Wheelrights*. On the contrary, Brown held the deed subject to the control of Joshua Elder, as his agent, and countermandable by him, retaining, as he did and intended to do, the absolute power over it. The grantees could, by no act on their part, entitle themselves to the deed. The grantor never parted with the dominion over the title to the negroes; and the possession of Brown, his agent, was, in judgment and contemplation of law, the possession of Elder, the principal.

[10.] Conceding, then, that Elder intended to vest Brown with authority to deliver this deed after his death, and deposited it with him for the sole purpose of enabling him to do so, is this an *actual* delivery of the deed? For while an authority to deliver may be revoked and is absolutely determined by death, the *delivery* itself cannot be recalled. A deed delivered is out of the reach of the grantor.

Did the grantees—the grand-children—acquire any title to the negroes until the deed was delivered to them after the death of Joshua Elder, the grantor? Did Joshua Elder divest himself of the title to the slaves, by depositing the deed with his agent, subject exclusively to his own control, and in no event to be delivered till after his death? Brown had no authority to deliver the deed during the life of Elder. He was expressly restrained from doing this. Had he done it his delivery would have been void, not being in pursuance of his authority. He had only a *naked power* to deliver the deed, after the death of the grantor. Could Elder create such an authority to be executed after his death, uncoupled with an interest? No man can, we apprehend, by deed, much less by parol, create a *naked power*, which shall survive him. For all

Wellborn vs. Weaver *et al.*

though the authority may, by its terms, be unlimited, it is nevertheless determined by the death of the principal (Coke Litt. 52, b. 4 Bo. Ch. Cas. 271.)

These authorities and numerous others, which might be cited to the same effect, establish the foregoing position. Brown's authority, then, was determined by the death of Elder, and the delivery after was void. Signing, sealing and the delivery of a deed, may either or all be performed by an Attorney. They must be done, however, in the life time of the grantor. If the grantor, after the execution of a deed, puts it in his scrutine or hands it to his agent, declaring, at the same time, that it is not to be delivered till his death, it is inoperative as a deed, for want of actual tradition.

[11.] And it by no means relieves the difficulty, by considering this instrument as an *escrow*. Delivery is as essential to an *escrow* as to a *deed*; the only difference being, that in one case the grantor makes the delivery to the grantee, and in the other to a stranger or third person. In either case, until the grantor makes the delivery, the instrument is a dead letter. (Perkins, 137, 138. 2 Johns. R. 248.)

[12.] Generally, an *escrow* takes effect from the second delivery, and is to be considered the deed of the party from that time. But this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed, in cases of necessity, to avoid injury to the operation of the deed, from events happening between the first and second delivery. When one makes a deed and delivers it as an *escrow*; and dies; or in the case of a *feme sole*, marries before the second delivery, the relation back to the time when the grantor was in life, or the *feme* was *sole*, is necessary to render the deed valid. (2 D. Com. 1807. 18 Viner's Ab. 29. Cruise's Digest, l. 32. c. 2, §§ 7 to 31. Com. Dig. *Fait* (A. 3.).

And upon these excepted cases, Judge Parsons put his decision, in *Wheelright vs. Wheelright*, and decided, that a writing delivered to another by the grantor, (not as his deed) to be delivered to the grantees, after the death of the grantor,

Wellborn *vs.* Weaver *et al.*

becomes the deed of the grantor, by such second delivery, from the time of the first delivery.

But was this instrument deposited in the hands of Brown as an escrow? In every case of an escrow there is a contract, and privity between the grantor and grantees. The person to whom the deed is delivered is, by mutual agreement, constituted the agent of both parties. He does not hold the deed, subject to the control of the grantor. He has no power over it, and can no more countermand the delivery of an escrow than of an absolute deed. And it is always in the power of the grantees to entitle himself to the deed and to the estate, by performing the stipulated condition. And when performed, the deed takes its whole effect by force of the first delivery, without any new delivery. (*Penymann's Case*, 5 Coke, 84, b.) But here no money was to be paid—no condition to be performed. The delivery was dependent merely upon the lapse of time. In such a case, is it necessary or proper to resort to a violent fiction, *ut res valeat, &c.*?

In every one of the excepted cases cited by Judge PARSONS, there was a condition to be performed, as a part of the contract, and that, too, for a valuable consideration. Under such circumstances, there may be some propriety of putting a case in this class of exceptions. But such was not the case of *Wheelright*; neither is it the case before us. We say this with all possible respect for the eminent Lawyer who made that decision.

[13.] Being satisfied that the act of registering a deed does not amount to such a delivery of it as will transfer the title from the grantor to the grantees, and that it being placed on the record by the direction of the grantor, is, at most, but *prima facie* evidence of its delivery, which may be and is effectually explained and rebutted by the testimony of plaintiffs themselves, it appears to us unnecessary to enter into a minute investigation of the doctrine upon this subject.

[14.] Whether an instrument be a deed or will, does not depend on its form or manner of execution, but upon its operation, has been repeatedly ruled by this Court. If it is not to

Welford *vs.* Weaver *et al.*

operate till after the death of him who makes it, it is a will, whatever be its form. A deed, if made with a view to the disposition of a man's estate, after his death, will be, in law, as a devise or will. (*Shergold vs. Shergold*, 1 Philom's R. 10, note (h.) *Warwick vs. Taylor* *Ib.* note (i.) *Therold vs. Therold*, *Ib.* p. 1. *Green vs. Proude*, 1 Mod. R. 117. *Peacock vs. Monk*, 1 Ves. Jr. 132. *Heekson vs. Wetham*, 1 Ch. Cas. 248. *Metham vs. The Duke of Devonshire*, 1 Picre W. 829. *Healey vs. Copley*, 7 Bro. Par. Cas. by Tom. 496. *Attorney General vs. Jones*, 3 Price, 358. *Dyer*, 314. 6 Pl. 97. *Powell on Devises*, by Jarman, vol. 1, pp. 10, 52, notes. 1 *Roberts on Wills*, p. 145.)

In *Habergham vs. Vincent*, 2 Vesey, Jr. 204, this whole subject was elaborately discussed and the law deliberately settled as here stated. All the authorities that bear on this question are there collected, on which that profound Lawyer, Justice Buller, says: "These cases have established, that an instrument in any form, whether a deed, poll or indenture, if the obvious purport is not to take place till after the death of the person making it, shall operate as a will. The cases for that, are both at Law and in Equity; and in one of these there were express words of immediate grant, and a consideration to support it as a grant; but as, upon the whole, the intention was, that it should have a future operation, after death, it was considered as a will." (p. 231.)

[15.] It was held by the Circuit Judge, that an instrument which is in form a deed, cannot be converted into a will, unless it appears, from its face, that it was not to operate till after the death of the grantor. But the authorities do not warrant this distinction. On the contrary, it has been repeatedly held, that the intention of the maker may be ascertained, not only from the instrument, but from extrinsic testimony. (1 Modern R. 117. 2 Nott & McCord, 531. *Milledge vs. Damar*, 4 *Dess.* 617. *Habergham vs. Vincent*, 2 Ves. Jr. 204, 202. *Ryden vs. Volier*, 2 Ves. Sr. 255, 268.)

The result of the whole matter is, then, that the plaintiffs cannot claim title to the property in suit, under this instrument,

MASON, FEBRUARY 1854.

ext.

Russell vs. Slayton.

as a deed; but that if valid at all, it must be as a testamentary paper, and be proved accordingly.

We see no error in the Court in allowing the testimony of Chandler to be introduced, as to the claim of title to the negroes by Elder, while he had them in possession, not that he could actually create title in himself by such declarations, but they served to rebut the presumption, that he held as trustee for his daughter; and thus, answered the purpose of fortifying his possessory title.

No. 51.—WILLIAM J. RUSSELL, plaintiff in error, vs. EUSEBIUS SLAYTON, defendant in error.

[1.] The Superior Court has authority to order its Sheriff to dispossess a claimant who is in possession of land, the title and right of present possession to which has been determined against him, upon trial of an issue formed under our claim laws, and judgment entered directing the same to be sold; and to put the purchaser into possession thereof.

Motion, in Fayette Superior Court. Decision by Judge O. WARNER, September Term, 1854.

A *fi. fa.* in favor of Thomas M. Jones vs. J. T. and J. W. Davis, was levied on a tract of land, to which Eusebius Slayton interposed a claim. The land was found subject, and the Sheriff ordered to sell. At the sale, William J. Russell became the purchaser. The present motion was for an order to the Sheriff, requiring to dispossess the claimant and put the purchaser in possession. The Court granted the order, and Counsel for Slayton excepted—1st. Because there was no notice to Slayton of the application for this order. 2nd. Because the Court had no authority to grant the order.

Russell vs. Slayton.

HINES & CONNER, for plaintiff in error.

No appearance for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[I.] Certain Acts of the Legislature have been cited by the Counsel for the plaintiff in error, as influencing this question.

Reference has been made to the Act of 1808, which makes it the duty of the Sheriff to leave a written notice with the owner, when he levies on land. Also to the Act of 1811, which prohibits the ordering or issuing of writs of possession by the Judge of the Superior Court, against third persons, provided such third persons shall not be known in the suit on which execution is founded, nor have been put in possession, nor claim under any conveyance from the defendant. The Act of 1823 was also referred to, which requires the Sheriff or Coroner to put the purchaser of real estate in possession, (without order) but forbids his turning out any other person than the defendant in execution, his heirs or tenants, if such other person were in at the rendition of the judgment.

It is plain, that neither of these Acts apply to the case of a claimant in possession of land, which, in an issue formed under our claim laws, to which he was a party, has been found subject to the *fit. fa.* as against him; and whom it is proposed to dispossess by order of Court. Two of these Acts show, however, that while the Legislature has been cautious, and has required Courts and ministerial officers to be so, in dispossessing persons whose titles to land have not been tried; yet, it has exercised equal care and caution in avoiding any interference with the right to deprive those of possession, whose rights have been tried. The *proviso*, for example, of the Act of 1811 is, “that such person” (the third person who it declares is not to be dispossessed,) “shall not be known in the suit on which execution is founded, nor have been put in possession by, or claimed under or by virtue of any conveyance from the defendant in such suit.”

Russell vs. Stayton.

Nor is there any other Statute in our State, which has prescribed the method of enforcing judgment in cases decided against claimants to real estate, determined against them under our claim laws, who are in possession, and who continue to hold possession thereof.

The question must therefore be determined upon the general principles of the Common Law, and of practice; and especially upon the principle, that the Courts have all power necessary to carry their legal judgments into complete effect. They accordingly have authority to carry their judgment in claim cases into effect.

The judgment in claim cases, after condemnation of the property where the claim is general, and the condemnation by verdict is general, is, that the Sheriff do proceed to sell, &c. as against the rights of the claimant of course. The verdict is against him, and it has determined the title against him; and the judgment is, in effect, that as against this title, the Sheriff do proceed to sell. In a case like that at bar, the judgment is against the right to possess *presently*, and the sale is of that right. Complete effect can be given to the judgment, in such a case, only by placing the purchaser in possession. This delivery of the property is the consummation of the sale. If it were personal property, it would be delivered at the place of sale, in order to make the sale complete.

This practice is in accordance with the spirit of the Acts of 1811 and 1823, which sanction the propriety of the Court's dispossessing, not only the defendant in execution, but all his tenants and privies. Why? Because their right and title have been considered and adjudged.

So have those of the claimant.

Let the judgment be affirmed.

Hollifield, adm'r, &c., vs. Stell.

No. 52.—GEORGE W. HOLLIFIELD, adm'r, &c. and others, plaintiffs in error, vs. JOHN D. STELL, defendant in error.

[1.] One of the items in the last will and testament of Tobias Lasseter was as follows: "I likewise give to my son, Hardy Lasseter, a negro woman named Kate; and in case the said Kate shall bear a child to live to the age of two years, my desire is that my daughter, Christina Lasseter, may be possessed of it; and in case the said Christina *"should die without an heir of her body,"* then the said child to be sold and the money equally divided between the three eldest brothers and their sister, namely: Benjamin Lasseter, Jesse Lasseter, John Lasseter and Rebecca Lasseter": *Held,* that the words of this bequest *ex vi. termini*, import an estate-tail; and there being nothing explanatory annexed to restrict their meaning, an absolute fee, under the Act of 1821, was vested in Christina Lasseter, in the child of Kate and its increase.

Trover, in Fayette Superior Court. Tried before Judge O. WARNER, September Term; 1854.

The sole question in this case arose upon the following clause in the will of Tobias Lasseter: "In case the said Kate (a negro woman) shall bear a child, to live to the age of two years, my desire is, that my daughter Christina Lasseter may be possessed of it; and in case the said Christina should die without an heir of her body, then the said child to be sold, and the money equally divided between the three eldest brothers and their sister, namely: Benjamin Lasseter, Jesse Lasseter, John Lasseter and Rebecca Lasseter." Kate had a child which reached two years of age. Christina went into possession of it, and died without leaving child or children. This action was brought by the persons to whom the estate was limited. The Court held, that, under this clause, Christina took an estate tail; and this decision is assigned as error.

BUCHANAN; MCKINLEY; TIDWELL & FULLER, for plaintiff in error

STELL; WARNER, for defendant in error.

Hollifield, adm'r, &c. vs. Stell.

• *By the Court.*—LUMPKIN, J. delivering the opinion.

[1.] This was an action of trover, brought by the plaintiffs in error against the defendants in error, to recover a number of slaves therein enumerated. The plaintiffs relied, for their title on the will of Tobias Lasseter, made in 1801, and admitted to probate in Greene County in 1804. It contains, amongst other things, the following item: “I likewise give to my son, Hardy Lasseter, a negro woman named Kate, and in case the said Kate shall bear a child to live to the age of two years, my desire is, that my daughter, Christina Lasseter, may be possessed of it; and in case the said Christina should die without an heir of her body, then the said child to be sold and the money equally divided between the three eldest brothers and their sister, namely: Benjamin Lasseter, Jesse Lasseter, John Lasseter and Rebecca Lasseter.” It is admitted that a female child was born to the woman Kate bequeathed to Hardy Lasseter; that it went into the possession of Christina Lasseter, and that the said Christina died “without an heir of her body.” Under these facts, the plaintiffs claimed the negroes descended from the child of Kate as remainder-men under the will of Tobias Lasseter; which claim is resisted upon the ground that the limitation over in this property is too remote; and that in consequence thereof, Christina Lasseter took an absolute fee under the laws of this State, in the slaves. And such was the judgment of the Circuit Court; which decision is excepted to; and this writ of error is prosecuted to reverse the same.

Before proceeding to examine the bequest in this will, it may not be amiss to glance at our own legislation upon this subject. The Constitutions of 1777 and 1789 prohibited estates tail. By oversight or otherwise, no such provision was contained in the Constitution of 1798. But by the Judiciary Act of 1799, estates tail are forbidden.

Doubts having arisen as to the true and proper construction

Hollifield, adm'r, &c. vs. Stell.

of the compendious provision in the Act of 1799, that "estates shall not be entailed," and a contrariety of judicial decision having obtained in consequence thereof, some of the Courts holding that conveyances for fee-tail were absolutely void—others, that they vested a fee-simple estate in the persons to whom they were executed—and others again, that they vested only a fee conditional at Common Law. The Legislature, in 1821, passed an Act to remedy this mischief; the first section of which declares, "that all gifts, grants, bequests, devises and conveyances, of every kind whatsoever, whether real or personal property, made in this State and executed in such manner or expressed in such terms as that the same would have passed an estate-tail in real property by the Statute of Westminster Second, (commonly called the Statute *de donis conditionalibus*) be held and construed to vest in the person or persons to whom the same may be made or executed, an absolute, unconditional fee-simple estate." (*Cobb's Digest*, 169.)

I will not stop to criticise the language of this Act. It is obvious to any lawyer, however, that the expression "as that the same would have passed an estate-tail" *in real property*, by the Statute of Westminster Second, is supererogatory; inasmuch as that Statute did not embrace *personal property*.

I would remark, that the Act of 1821 was *declaratory*, and is to be so interpreted; and it is precisely the same as though the first section which I have quoted, was incorporated with and made a part thereof by way of addition to the 5th section of the Act of 1799, so that the whole would read thus: "Estates shall not be entailed, and all gifts, grants, &c." In this view of it, therefore, the first section of the Act of 1821 extends as well to instruments made before its passage as since. In other words, it applies to all gifts, grants, bequests, devises and conveyances of every kind whatsoever, whether of real or personal property, executed since 1799.

It is insisted that the Courts of this State, under this Act, apply the same rule of construction to deeds and wills, whether of real or personal property, which the British Courts

Hollifield, adm'r, &c. vs. Stell.

have placed upon similar instruments, under the statute *de donis* disposing of real estate.

If so, not one out of a hundred of the numerous adjudications made in this State, either before or since the organization of this Court can be sustained. The view uniformly taken by all the Courts of this State is this: while our Courts have felt constrained, by the stringent terms of the Act of 1821, to bring all cases to the test of the Statute of Westminster, they have not felt themselves bound by the construction put upon that Act in England, and for this most obvious reason. To favor the heir at law, the Courts there have wrested, confessedly, the words of the Statute from their natural signification and common sense meaning, and given to them an arbitrary and technical interpretation. Now not only no such motive exists here, for doing violence to the words of the Statute, but a contrary policy should obtain. In short, while we, in obedience to the mandate of the Legislature, enforce the Statute *de donis*, we read it as it is written, and not as the English Courts have made it, to subserve a particular purpose. And if this is not allowable, we must retrace our steps and over-rule, *uno flatu*, all that we and our predecessors have decided upon this subject, beginning with the case of *Atwell's executors vs. Barney*, (*Dudley's Rep.* 207) and coming down to *Williams vs. Allen*, decided a few days since at Columbus.

Nor are we without authority for this course. The English Courts, themselves, have in deeds and wills of personality, construed words in their natural sense, and consequently have been driven to the necessity; I should say absurdity, of applying a different meaning to the same words in the same instrument, when it contained both realty and personality.

Hence, in our opinion, this and like cases should be examined in the light of English decisions, as to personality rather than as to realty; and that there is nothing in the Act of 1821 which concludes the Courts to a contrary course. It may be suggested, that by putting a rigid construction upon the Act of 1821, and applying the doctrine of the English Courts, as to realty, to all conveyances in this State, we should

Hollifield, adm'r, &c. vs. Stell.

entrammel property at once; and that instead of leaning against the Courts, should incline in favor of that view; that by converting the instrument into an estate tail, we do but declare it a fee simple under the Statute. And there may be something in this suggestion; still, we can hardly believe that it was the intention of the Legislature, by the Act of 1821, to prevent testators and others from rendering estates unalienable within the limits prescribed by law, to-wit: during a life or lives in being, and twenty-one years after, and a few months more, to provide for the case of a posthumous child. And the Act of 1854, in relation to the limitation over of estates, is confirmatory of this conclusion. (*Duncan's Digest*, 8.)

Take, then, the clause under consideration—"and if she die without an heir of her body, then," &c. And does it, in connection with the previous bequest to Christina Lasseter, technically and *propria vigore*, create an estate tail? A few reported cases may be found, perhaps, negativing this proposition. We are well satisfied, however, that the great current of authority is strongly the other way. Turn to *Davie's Abridgment*, *Conyer's Digest*; *Cruise's Digest*, *Fearne* or any of the standard elementary works, and under the head of estates in tail and devises, the cases cited, are so numerous and apposite, as to leave no earthly doubt but that the words of this will, of themselves, and without explanation, created an estate tail in Christina Lasseter; and therefore, under the Act of 1821, vested the fee simple in her. And it would be an absurd affectation of case-learning and adroitness in case-hunting, to cite authorities upon this subject.

Have words of explanation been annexed by the testator, in this will, which may control the technical phraseology which he has employed? Mr. *Hargrave* denies to the Courts the right to institute any such investigation, and insists, that the rule is a policy of the law, and that it is of a quality, rigid, stubborn, imperious, irresistible, and so indispensible as to be above all exception whatever; and that, firm and immovable in its claim of sole empire, and looking down on private intention as its lawful subject, the rule will neither give nor accept

Hollifield, adm'r, &c. vs. Stell.

of any terms of capitulation. (*Law Tracts*, 562, 574.) And that he would apply the rule, notwithstanding the party should express, in his will, that the rule should not be applied, and that the remainder to the heirs of the tenant for life, *should operate by purchase*. (*Ib.*)

Lord Mansfield, on the other hand, in *Perrin and Blake*, (6 *Cruise*, 389,) observed, that he always thought, that as the law had allowed a free communication of intention to a testator, it would be strange to say, "now you have communicated that intention so as every body understands what you mean; yet, because you have used a certain expression of art, we will cross your intention and give your will a different construction; though what you meant to have done is perfectly legal, and the only reason for contravening you is, because you have not expressed yourself like a lawyer."

The Courts in this country, at least, have followed the lead of Lord Mansfield and those Jurists who maintain that the legal intention, when clearly explained, shall control the legal sense of a term of art, unwarily used by the testator; that he shall be allowed, as it were, to correct the inaccuracy of his own phrase; that in the sturdy truism of Justice Reynolds, in old *Fitzgib.* 113, a man shall be permitted to speak his mind in his will.

And it may now be assumed as settled, that there is no form of words, such as "*heirs of the body*," "*dying without issue*," or any other sort, which will not yield to the manifest intention of the testator, provided that intent be consistent with law, and provided it be so fully expressed in the will itself; or else, may be collected from thence by such cogent and demonstrative arguments, as to leave no doubt, in any reasonable mind, whether it was his intent or not; and such was the opinion of Sir William Blackstone, in the admirable judgment which he delivered in *Perrin and Blake*, and which stands unrivalled as a specimen of Judicial composition. (*Har. Law Tracts*, 502, '3, '4, '7.)

1. The word "*then*," in this bequest, is relied upon as restricting the meaning of the words, "*should die without an*

Hollifield, adm'r, &c. vs. Stell.

heir of her body," to an heir living at the death of Christina Lasseter. Concede that the word "then" is an adverb of time, does it refer to the death of Christina Lasseter, or to the failure of the heirs of her body? The cases cited by the learned Counsel for the defendant in error, and others which might have been adduced, show conclusively, that it does not relate to the death of the daughter of the testator, and fixing that event as the time when the limitation over to the plaintiffs was to take effect. (1 P. Wms. 563. 7 T. R. 551. 2 Atkin. 507. 1 Bro. Ch. R. 174. 1 Nott & McC. 69. 1 Hill's Ch. R. 39.)

In most of the cases, this word is not considered or regarded as having any operation whatever, either by the Counsel or the Court; and whenever it has been relied on, it has been emphatically over-ruled.

2. It is contended, that the circumstance that the property is a negro, necessarily restricts the meaning of the words in the will, to an heir living at the death of Christina Lasseter. The prompt and proper reply, by the thoroughly prepared Attorneys of the defendant is, that in *Daviage vs. Chany*, 4 Har. & McHen. 393. *Matthews vs. Daniel*, 1 Murphy, 42. *Bryson vs. Davidson*, Ib. 143. *Guerry vs. Vernon*, 1 N. & McC. 69. *Henry and Wife vs. Fielder*, 2 McC. Ch. R. 323, and *Robinson vs. McDonald*, 2 Kelly, 120, and many other cases which might be enumerated, the subject of the bequests was negro property; and yet, the limitation over was pronounced void. And hence, it is legitimately concluded, that the nature of the property bequeathed, does not restrict the meaning of the technical terms.

3. Again, it is argued that the artificial language of this will, is restrained by the distributive disposition, that if Christina should die without an heir of her body, "then the said child be sold and the money be equally divided between the three eldest brothers and sisters," &c. But upon this as upon every other point of attack, the assailants are met, and their blow parried by their adroit and skilful antagonists.

It is answered, and we think triumphantly, that it is only

Hollifield, adm'r, &c. vs. Stell.

when distributive words apply to heirs, as a class, and indicate a different species of heirs from those denoted by the words upon which they are engrafted, that they have a restrictive effect; that in the case at bar, they apply to the three sons and daughters of the testator, and not to a class of heirs. They apply to the persons specifically named in the will, to whom the property was limited over, and not to the heirs of the body of Christina Lasseter. If this had been a bequest to Christina Lasseter and the heirs of her body, to be equally divided among them, then, according to the ruling of this Court in *Tucker vs. Adams*, (11 Ga. R. 567,) and the established doctrine upon this subject, the words "equally divided," would have been words of restriction, because they would have denoted a different species of heirs from those denoted by the words, "heirs of her body." It is only when the distributive words change the line of descent marked out for property, by the words upon which they are engrafted, that the latter are taken as words of purchase. Here the fact is otherwise. Consequently, the words, "should die without an heir of the body," must be taken as words of limitation, that being their technical meaning.

Lastly—it is said that the limitation over, in this case, being to persons who were in life at the execution of the will of Tobias Lasseter, effectually rebuts the inference, that an indefinite failure of issue was intended.

I hazard the assertion, that in more than three-fourths of the reported cases, from the year of 1285, when the Statute of Entailments, commonly called the Statute *de donis* was passed in the 13th year of King *Edward I.* down to the present time, the limitations which have been set aside, were to a person or persons in *esse*. The earliest case to be met with under the Statute was of this sort, and was decided in the 35th of *Ed. III.* (*Pl. 14.*) Sd in *Sanday's case*, (9 Coke, 127.) So, also, in the case of *King vs. Rumball*, (Cro. Jac. 448.) *Pell vs. Brown*, (Cro. Jac. 590.) *Chadock vs. Cewley*, (Cro. Jdc. 695.) But I forbear to specify the cases. They lie scattered

Hollifield, adm'r, &c. vs. Stell.

every where through the Books, "thick as the autumnal leaves which shade the vale of Valambrosa."

And this disposes of all the words relied on in this will, to restrict the otherwise naked limitation, "in case Christina Lasseter should die without an heir of her body." And we hold, with the Court below and with the able and distinguished Counsel who have conducted this argument with such marked ability, that the words of this bequest do not mean an heir of Christina Lasseter, living at the time of her death; but a general and indefinite failure of such heirs, whenever it shall happen, sooner or later, without reference to any particular time or any particular event. And our judgment therefore is, that such attempted disposition of property, inasmuch as it would tie it up for generations and lead to a perpetuity—vests the absolute fee in Christina Lasseter, the first taker.

It may readily be conceded, that testators do not intend deliberately to dispose of their property, contrary to law. They would be stultified by such a supposition. And yet, they very often do mean to give their estates to their children and their posterity after them, if they have any; and that without having any very definite period fixed in their mind, as to the time when the event may happen; still, they do not intend it shall go over to collaterals or remainder-men, who are more remote, until the posterity of the first taker has become extinct. In other words, so far as they have any meaning in their minds about the matter, testators do look to a general and indefinite failure of issue. This feeling is founded on the dictates of the heart; and hence, they use language expressive of their desire in this respect.

No. 53.—CHARLES CLEMENTS, plaintiff in error, *vs.* Wm. P. MALONEY, administrator, &c. defendant in error.

[1.] Where the verdict of a Jury is against an administrator, in his representative character, a judgment for costs should be entered against him in the same character.

Motion, in Fayette Superior Court. Decision by Judge O. WARNER, September Term, 1854.

Maloney, as administrator of Phebe Ryle, filed a bill against one Nixon, as administrator of James Ryle, to have titles perfected to certain negroes, and for a distributive share of the estate. Nixon died, and Clements, as his administrator, was made a party. On the trial, the Jury decreed that titles to the negroes be considered as made, “and that defendant pay the costs of said suit.” The answer of Clements, as administrator of Nixon, denied having any assets of Ryle’s estate in his hands. On the verdict of the Jury, judgment was entered against Clements, *individually*, for the costs. A motion was made to set aside this judgment, and have it entered against him, in his representative character. The Court refused to grant the order, and this decision is assigned as error.

TIDWELL & FULLER, for plaintiff in error.

HINE & CONNER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

A very limited record presents the issue for our consideration in this case.

[1.] So far as we are capable of judging from that record, the verdict was obtained against the plaintiff in error, in his character of administrator. In that character, he had been made a party to the bill, after the death of his intestate, and

Sharp *vs.* The State.

in place and stead of the latter. He found the case in Court, and was not responsible, individually, for the acts or conduct which made it necessary for it to appear there. In the discharge of his duty, after he had been made the party defendant, he pleaded *plene administravit*. Under these circumstances, without negativing this plea and finding assets in his hands, the Jury, after decreeing title in the complainant to the negroes, claimed, find and decree "that defendant pay the costs of said suit."

The legal character of such a verdict is and can be nothing else, but a finding against Charles Clements in his representative character: for in such character he was made the defendant; and as we have seen, the proceedings and the verdict show no other liability.

To have been in conformity with the verdict, the judgment for costs should have been entered up against the defendant in his representative character. But this was not done; and we think that the Court, therefore, erred in refusing to set that judgment aside, and in not directing the judgment for costs to be entered *nunc pro tunc* against the defendant in his representative character.

That this may be done, we reverse the judgment.

No. 54.—MATTHEW SHARP, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] Every indictment is sufficient, which states the offence in the terms of language of the Penal Code, or so plainly that the nature of the offence may be easily understood by the Jury.

[2.] The case of one who, by pleading not guilty to an indictment for retailing liquors without license, alleges that he retailed with license; is not an exception to the general rule, that he who alleges an affirmative must prove it.

Sharp *vs.* The State.

Indictment, in Macon Superior Court. Tried before Judge POWERS, September Term, 1854.

Matthew Sharp was put upon his trial, under an indictment charging him with the offence of "retailing without license." Counsel for defendant moved to *quash*, on the ground that it should have charged him with a "misdemeanor." The Court over-ruled the motion, and this is the first error assigned.

The Solicitor General closed his case without proving that defendant had no license. The Court charged the Jury, that it was not incumbent on the State to prove the fact that defendant had no license. The *onus* was on him to show that he had license. This charge is the second error assigned.

BLANDFORD & CRAWFORD; OLIVER & CLEMENTS, for plaintiff in error.

Sol. Gen. DEGRAFFENREID and WHITTLE, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The indictment stated the offence in the terms and language of the Code, or so plainly that the nature of the offence might be easily understood by the Jury; and that is all that the law requires. (*The Code, Cobb's Dig.* 818, 833.)

It is a general principle of law, that the party that alleges the affirmative of a proposition, especially if the proposition concern something which must be peculiarly within his knowledge, must prove the proposition.

[2.] The case of one who, by pleading not guilty to a charge of retailing without license, alleges that he retailed with license, is not an exception to the general rule. (*Apothecaries' Company vs. Bentley, Ky. & Mood.* 159. See 1 Starkie on *Evidence*, and cases cited. 1 Green. *Evidence*, Sec. 79, and cases cited.)

Hodges *vs.* Myers, Suydam & Co.

In accordance with this principle was the charge of the Court. That charge was therefore right.

So there should be a general affirmance.

No. 55.—JAMES O. HODGES, plaintiff in error, *vs.* MYERS, SUYDAM & CO. defendants.

[1.] The Act of 1845, organizing the Supreme Court, and which required the transcript of the record to be made out and testified by the Clerk of the Superior Court, within ten days after the filing the notice of the signing of the bill of exceptions in the office, is virtually repealed by the Act of 1850, allowing until the first day of the next term of the Court to which the case is made returnable, to send up the papers.

[2.] Sheriffs are not liable to be ruled, for monies collected by them out of their county.

Rule, from Macon Superior Court. Decision by Judge POWERS.

The decision of the Court renders a statement of the facts unnecessary.

LAMAR & LOCHRANE, for plaintiff in error.

W. & H. C. POE, for defendant,

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] A motion is made to dismiss the writ of error in this case, because the transcript of the record was not made out and transmitted by the Clerk of the Superior Court, within ten days from the time the original notice of the signing of the bill of exceptions, with the entries thereon, was filed in office.

In *Tompkins vs. Tigner*, at the late term of this Court, at Columbus, we held, that the Act of 1845, organizing the

Woods, ex'r, &c. vs. Woods *et al.*

Court, was virtually repealed in this respect by the Act of 1850. By the 3d section of this latter Act, it is provided, that "when exceptions are filed in any case in the Superior Court, the Clerk of the Superior Court shall make out a copy of the bill of exceptions and send it up to the Supreme Court, on or before the first day of the Court to which the writ of error is returnable, with the transcript of the record," &c. (*Cobb's Dig.* 455.)

If the transcript need not be sent up to this Court until the session to which the writ of error is returnable, it would be useless as well as oppressive, to require it to be made out within ten days, under the old law, instead of allowing the Clerk until the ensuing term to perform the service. Such, we think, was the obvious intention of the law.

[2.] In *Edward Kellogg & Co. vs. Green B. Mayo*, decided at Columbus, January Term last, (1855) p. 187, this Court held, that Sheriffs were not liable to be ruled for monies collected by them, out of the county for which they were Sheriffs. In other words, that the residence of the officer and not the place where the process issued, fixed the jurisdiction. Any other practice would involve manifold inconveniences, as well as absurdities. The Sheriff might be summoned to answer to rules in two counties, not only remote from each other, but also from his own, and the Court be sitting in all three at the same time. I forbear to discuss a question which has been already settled, and I doubt not, upon sound principles.

No. 56.—BENJAMIN W. WOODS, executor, &c. plaintiff in error,
vs. ABRAHAM D. WOODS *et al.* defendants in error.

[3.] If the securities of an insolvent debtor, at any reasonable period of the term before the jury is discharged, and in time for the necessary issues to

Woods, ex'r, &c. vs. Woods et al.

be formed and tried, do render the body of the debtor into Court, they should be relieved from their liability.

Casa, in Pike Superior Court. Decision by Judge STARKE, October Term, 1854.

Abraham Woods being arrested under a *ca sa.* gave bond for his appearance at Court, to take the benefit of the Honest Debtor's Act. Failing to appear when the case was called in its order, judgment was entered against him and his sureties on the bond. Afterwards, during the same term, his sureties produced him in Court; and on motion, the Court vacated the former judgment, and allowed him to be discharged, on taking the oath prescribed.

This decision is assigned as error.

ALFORD & MOORE, for plaintiff in error.

H. & G. J. GREEN and MARTIN, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] We have disposed of the point presented by this record, in a recent case decided at Columbus, in which we have expressed an opinion adverse to the position of this plaintiff in error.

The principle upon which that decision rested, was simply as follows: The requirement of the bond given by an insolvent debtor, when arrested on *ca. sa.* for his appearance, &c. is, that he will appear "at the next term" of the Court, "then and there to stand to and abide such proceedings as may be had by the Court, in relation to his, her or their taking the benefit" of the Honest Debtors' Act. And the Act provides, that "in case of failure to appear, judgment shall be entered up instanter upon said bond, against the principal and his securities," &c.

It is thus perceived, that the exigency of the bond is, that the debtor shall appear at the next term—not the first day of the

Downs, &c. vs. Yonge, &c.

term, or on any other particular day thereof, but at *the term*. This might be construed to mean the first day of the term, or at any other point of time therein, when, in the due and regular order of proceeding, the case was called. And this strict view would be correct, perhaps, if the interests of the debtor were alone at stake. But the rights and interests of the securities are here concerned; and *quoad* them, these provisions should receive that liberal construction which, whilst it favors substantial justice, allows to them the latest reasonable period within the term of the Court at which they may produce the body of the debtor, and discharge themselves.

In this point of view, we think, that if the securities do thus render the body of the debtor at some reasonable period of the term, before the Jury is discharged, and in time for the necessary issues to be formed and tried, (if in order for trial) they should be relieved from their liability. Hence, we think the proper practice would be for this docket to be taken up as the last business in order, before the discharge of the Jury. And we know this to be the practice in some parts of our State.

In this case, it appears that the debtor was produced by his securities in such reasonable time; and we therefore affirm the judgment of the Court.

No. 57.—JAMES DOWNS and another, for the use &c. plaintiffs in error, vs. GEORGE YONGE, Superintendent, &c. WESTERN & ATLANTIC RAIL ROAD, defendant in error.

[1.] A deed for land, which has but one witness to it, is not void for all purposes, if it is void for any.

[2.] It is not error to reject evidence that is irrelevant.

Case, in Fulton Superior Court. Tried before Judge O. W. Martin, October Term, 1854.

Downs, &c. vs. Yonge, &c.

This was an action brought by James Downs and another, against Yonge, as Superintendent of the State Road, for damages to a lot of land No 112, 14th district, 6th section DeKalb, now Fulton County, by the running of the rail road through the land. On the trial, the plaintiffs showed title in themselves. Defendant then proved statutory title in one M. C. Martin, and offered in evidence a deed from Martin to the right of way, dated in May, 1838. This deed was attested by only one witness. Objection was made on that ground, which being overruled by the Court, plaintiffs excepted.

Plaintiffs then offered in evidence a *fi. fa.*, against Martin, upon which there was a levy on and a sale of this lot of land, prior to May 1838; but plaintiffs did not claim under this sale. The Court rejected the evidence, and plaintiffs excepted.

Upon these exceptions, error is assigned.

RUTHERFORD & EZZARD, for plaintiff in error.

OVERBY & BLECKLEY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Neither the Common Law nor the Statute of Frauds requires that a deed, to be valid, must be executed in the presence of witnesses. (*Com. Dig. Fait, (B. 4 a.) 2 Black. Com. 307.*)

The Act of this State, of 1785, declares, that all deeds, by way of bargain and sale, executed under hand and seal, on a valuable consideration paid, in the presence of *two or more witnesses*, that are proved or acknowledged, and that are registered within twelve months from their date, shall be *good and valid*. But the Act does not declare that deeds deficient in any of these respects, shall be *void*. (*Cobb's Dig. 164.*)

The Act of 1760 contains a declaration with respect to deeds of land, similar to that contained in this Act of 1785. The words of the Act are these: "all conveyances of lands and tenements, shall be made by deed of bargain and sale," and "enrolled or registered," "signed and sealed," "before two or more

Downs, &c. vs. Yonge, &c.

witnesses, who shall likewise sign," &c. Again—"All conveyances of lands and tenements, made and executed, and enrolled and registered, according to the intent and meaning of this Act, shall and are hereby declared valid in law," &c. (*Id. 161.*) And yet, the Act of 1768 treats deeds, made after the passage of the Act of 1760, and not recorded within the time prescribed by that Act, as not *void*. On the contrary, it provides a time within which they may still be recorded; and then, after providing a time within which deeds made after its passage may be recorded, it goes on to say, that deeds thus recorded shall be held as the *first* deed, and shall be held *valid*, *any former conveyance not recorded as aforesaid, to the contrary notwithstanding.* (*Ibid. 162.*)

This Act of 1768, therefore, may be considered as expressive of the Legislative interpretation of the words aforesaid, in the Act of 1760. Those words were, as we have seen, "all conveyances" "*shall be made by deed of bargain and sale*" *enrolled*. "All conveyances made" &c. "enrolled," &c. "according to the intent" of the Act, &c. shall and are hereby declared *valid* in law, &c.; that interpretation being, that the words, though requiring all conveyances to be recorded, did not render *void* such as might not be recorded, but only postponed them to such as might be recorded. And the correctness of this interpretation is favored by what is to be found in the oldest Act of all, on this subject, of deeds—that of 1755. That Act contains a requisition that all deeds shall be registered within sixty days from their date; and also a declaration, that all such as shall be so registered, shall be deemed "*to be prior*" to all such as shall not be so registered. The latter are to lose their priority. That is all. They are not to be rendered *void*. (*Id. 159.*)

The provisions of this Act of 1755, and also those of the Act of 1768, making this the only effect of the failure to record a deed within prescribed time are general—extending as well to deeds made before, as to deeds made after their passage.

Downs, &c. vs. Yonge, &c.

It is true, that these two Acts concern only one of the things which the Act of 1785 requires, as to deeds—that of registry. They do not expressly say what is to be the effect of a failure to execute the deed in the presence of two witnesses; but registry doubtless was deemed by the Acts, at least as important as the presence of two witnesses. At any rate, when these Acts say that the effect of the not recording a deed within prescribed time shall be merely to postpone the deed to deeds recorded within prescribed time, they say, in substance, that the effect of the non-attestation of a deed by as many as two witnesses, shall be merely to postpone it to such deeds, as, having the attestation of two witnesses, are so recorded, for the effect of the non-attestation of a deed by as many as two witnesses, is to prevent the deed from ever being recorded.

Now, if the words of the Act of 1760 were used in the sense in which, according to this Legislative interpretation they were used, it is fair to presume that the same words, or the words of the same import of the subsequent Act—that of 1785—were used in the same sense.

And this presumption is strengthened by the action of numerous Legislatures, subsequent to that which passed the Act of 1785. This action treats deeds not recorded within the time prescribed by that Act, as not void, but in some cases, as entitled to the indulgence of further time for getting themselves recorded, and in no case as subject to a worse fate than that of a postponement to deeds recorded within the prescribed time.

The Act of 1788 declares, that “no deed, &c. ‘shall in any wise, be affected by reason of the same not being registered,’ &c. ‘agreeably to the said Act,’ (of 1785.) (*Wat. Dig.* 372.) In 1790, this Act of 1788 was revived and continued in force until February, 1793. (*Id.* 425.)

The Act of 1812 seems to assume, that even one witness to a deed, if he is a Justice of the Peace or a Clerk of the Superior Court, is sufficient to make the deed admissible to record. A deed so attested and recorded, the Act makes admissible evidence. The Act seems to have no suspicion that there is,

Downs, &c. vs. Yonge, &c.

in such case, any thing more for the Legislature to do—that a deed in such a case needs a declaration, that it does not lose its priority, much less one that it is not void. (*Cobb's Dig.* 167.)

So the Act of 1826 makes deeds, improperly recorded, some for one thing some for another, admissible in evidence. The Act also gives leave for the registry within twelve months of all deeds properly executed and proved, but not recorded. (*Id.* 170.)

Of the same character is the General Act of 1827. (*Id.* 172, 173.)

At length, in 1837, the Legislature, after giving an extension of the time for recording, to such deeds as needid it, laid down for future deeds three general rules—1. That deeds made after the passage of the Act, might be recorded at any time. 2. That if, however, any deed should not be recorded within twelve months from its date, it should be postponed to a younger deed, which should be recorded within twelve months from that deed's date, unless that younger deed had notice of the other. 3. And that if of two or more deeds all should be well recorded, the oldest deed should have the preference. (*Cobb's Dig.* 175.)

It is useless to pursue the Legislation of the State further, to find out what the Legislature considered to be the effect, under the Act of 1785, of the failure to record a deed. There is more of it. (*See Cobb's Dig.* 176, '7, '8, '9, 180, 181.) Suffice it to say, that the further legislation is all in harmony with that which has been already noticed. And that already noticed shows the Legislature's understanding of the Act of 1785 to have always been this: the failure to record a deed within prescribed time, postpones the deed to a younger deed, recorded within prescribed time, but does not render it *void*.

This understanding of the Act entertained by the Legislature, is that, too, which has ever been the understanding of it, held by the Courts, as far as the information of this Court goes.

Finally, the rules of construing Statutes, forbid that the Common Law, or a Statute, shall be considered as repealed by

Lewis *vs.* Allen and Leak.

a Statute by implication, unless the implication is very strong—as strong as that which is made by negative words, or affirmative words carrying in them, unmistakably, the sense of negation. (1 Black. Com. 89.)

The implication in the Act of 1785, does not come from negative words. The words of the Act are affirmative, not negative. They are, in substance, that all deeds witnessed by two or more persons and recorded, shall be good and valid. They are not that all deeds not so witnessed and recorded, shall not be good and valid.

[1.] The conclusion, therefore, to which this Court comes, is, that this deed, though witnessed by but a single person, was not a void deed. And this Court is therefore of opinion, that the deed was properly admitted in evidence—at least for the purpose for which it was admitted—which was merely to show that the State was not a *trespasser* in running the Rail Road over the lot of land.

My own opinion is, that the deed is a good deed, subject, however, to the preferences which other and younger deeds may get over it, by being well recorded—it being a deed which cannot, by reason of having only one witness to it, be well recorded.

[2.] The *fi. fa.* was clearly not admissible as evidence. The plaintiffs derived no title under the *fi. fa.* They, therefore, had no right to use the *fi. fa.* The *fi. fa.* was simply irrelevant.



No. 58.—CURTIS LEWIS, plaintiff in error, *vs.* ROBERT ALLEN and WM. V. LEAK, defendants in error.

[1.] In a suit by a person standing in the shoes of a partner, against the co-partner, the admissions of the partner are not evidence in favor of the plaintiff.

Lewis vs. Allen and Leak.

In Equity, in Pike Superior Court. Tried before Judge STARKE, October Term, 1854.

Curtis Lewis filed a bill against Leak and Allen, as partners, to reach the partnership assets of the firm. Defendants filed separate answers. On the trial, the Judge charged the Jury —that the answer of Leak was not evidence against Allen, to increase in Allen's hands the amount of assets claimed to be the effects of Leak and Allen.

This decision is assigned as error.

McCUNE; ALFORD & MOORE; A. R. MOORE, for plaintiff in error.

FLOYD & BORDERS; POE; GREEN, for defendant in error,

By the Court. — BENNING, J. delivering the opinion.

Lewis says that he owes Allen; that Leak owes him; that Leak is insolvent; that Allen owes the partners, Leak and Allen, so much, that on a settlement of the partnership, Allen would be found to owe Leak a large balance; and Lewis prays that this balance may be applied to the payment of what Leak owes him, so that he may with it pay what he owes Allen. This is the bill.

Leak, in his answer, admits this, in substance, to be true. But Allen, in his answer, does not.

Lewis insists that this admission of Leak binds Allen.

The Court below held, that the admission did not bind Allen.

The question is, was that decision right?

Lewis, of himself, has no right, of any sort, against Allen. Whatever right he has against Allen, is such as he has by virtue of his right against Leak, and Leak's right against Allen. Lewis, in bringing the bill, has to stand in the shoes of Leak.

Lewis *vs.* Allen and Leak.

The question, then, whether this admission of Leak's binds Allen, is the same as it would be, if Leak stood in his own shoes—is the same as it would be if the suit was by Leak against Allen.

Suppose, then, the suit to have been by Leak against Allen, instead of being, as it is, by Lewis against Allen, could an admission, by Leak, that Allen was indebted to him, Leak, be received as evidence against Allen? most certainly not. *Admission* is not the word for such a thing—*claim*—adverse claim, is the word. Leak *claims* that Allen owes him a debt—not admits that Allen owes him one. This is the appropriate language. Is such a claim to prove itself, because made by one partner on another?

It is certainly true, as a general rule, that the admission of one partner binds the other. But this is so only in cases in which the admission is against the interest of the partner making it, as well as against that of the other partner. In no case does the admission, so to speak, of one partner, which is favorable to himself and adverse to his co-partner, bind the co-partner. To make such an admission bind the co-partner, would be to introduce a rule that could not work "both ways," without its effects cancelling each other. If, in a case between partners themselves, the admission of one binds the other, of course the admission of the other must bind him. In such a case, the result would be a war of admissions between the partners; and the last admission would be the victor.

[1.] And what are the admissions in this case? Leak admits a state of things that makes Allen his, Leak's, debtor—not a state of things that makes Leak and Allen Lewis's debtor. This admission operates altogether in favor of Leak—altogether against Allen; and it is made in a case which is the same as if it were between Leak and Allen. Such an admission cannot bind Allen. And in so deciding, we think the Court below decided right.

With this opinion there is nothing inconsistent, in *Clayton vs. Thompson & Reeves*, (13 Ga. R. 206.)

In that case, Clayton did not claim through Reeves, the

Wood et al. vs. McGuire's Children.

partner of Thompson. He did not stand in the shoes of Reeves, as against Thompson and Reeves. He claimed by an independent title of his own, and claimed against the partnership of Thompson and Reeves. In such a case, any admission of the claim by Reeves, would be an admission against the interest of Reeves; and one, therefore, which would not only bind him, but bind his co-partner, Thompson.

So the judgment of the Court below ought to be affirmed.

No. 59.—WILLIS WOOD and another, plaintiffs in error, vs.
MILLY MCGUIRE'S CHILDREN, defendants.

- [1.] A party, when put upon the stand as a witness, under the Act of February, 1854, is liable to be cross-examined, as other witnesses now by law are.
- [2.] The regular mode of conducting the examination of a witness, is first, to be interrogated by the party introducing him; then to be cross-examined by the other side; and again, to allow the original party the privilege of putting further questions, explanatory of the first, or by way of rebuttal of the cross-examination. If new matter is elicited, opportunity should be extended to the opposite party, of inquiring further, as to that.
- [3.] The admissions of a party against his interest, as to property in his possession, or to which he claims title, are competent evidence; and they are good as to those who claim under the declarant, whether he were in actual possession or held the paramount title, at the time they were made, or not.
- [4.] A person who takes a conveyance to land and goes into possession, recognizing another as the true owner, holds in subordination to the tenant in fee.
- [5.] If one takes a conveyance to land, *bona fide*, believing that he acquires the fee, notice of an outstanding title cannot affect his rights.
- [6.] Where both plaintiff and defendant in ejectment, deduce title from a common source, it is not necessary for either to go beyond that.
- [7.] Where several defendants in ejectment claim separate parcels of land, under distinct titles, and they do not sustain the relationship of landlord and tenant to each other, a joint action cannot be maintained against them;

Wood et al. vs. McGuire's Children.

nor can a joint or several recovery be had, under the laws of this State, either for the premises or *mensa* profits.

[8.] It is error in the Court, at the close of its charge to the Jury, to refuse to listen to a written request, at the instance of Counsel, to further charge the Jury, *regardless of the character of the request*.

Ejectment, in Bibb Superior Court. Tried before Judge HARDEMAN, November Term, 1854.

The following is the bill of exceptions:

Plaintiff introduced as evidence the will of Thomas Rainey, dated 17th September, 1828, and admitted to probate 6th January, 1829, and regularly executed, so as to pass real estate. Item 7th in said will, is as follows: "I will and bequeath to my grand-children, the children of Milly McGuire, their heirs and assignees, forever, lot or parcel of land containing 2024 acres, known by lot No. 68, in the 4th district of Houston County. This is the only clause in said will, affecting the matter in controversy.

Plaintiff then introduced Abner Rainey, who testified: Knew the premises in dispute; worth, for rent, \$100 to \$125 per annum; worth for four years last past, \$100 per annum. I would not take it at any price, without insurance, because it is liable to overflow. It has not overflowed so as to lose a crop in four years. Knew Absalom B. McGuire in 1831 or 1832, and from then until he left the country. I saw him in 1831 or 1832, in a shanty, and if he showed the right lines to me, it was in the premises in dispute. The shanty was temporary; I have seen a better where parties stopped only for the night.

There was no clearing—no timber cut; a few brush were cut that looked like children's work; I was there but the one time; went over there to offer to help McGuire build; I never saw McGuire on the land, after that time; he may have left the place next morning, so far as witness knows.

During this interview Absalom B. McGuire did not say anything about the title, or how he claimed the land, or that it

Wood *et al.* vs. McGuire's Children.

belonged to his children under their grand-father's will—said nothing about it. When he, McGuire, left, he moved up on the Columbus road, and never occupied the land afterwards. The land is mostly in the swamp, only two or three acres out of the swamp—some of it marshy, and all but the two or three acres liable to freshets. I saw Calhoun's hands clearing the land; never saw McGuire or his hands clearing the land.

Copy of *subpæna duces tecum* served upon Calhoun, to produce papers, was then introduced, and is as follows:

To William Calhoun, Greeting: We command and formally enjoin you, that laying all other matters aside, and notwithstanding any excuse, you be at our Superior Court to be held at Macon, in the County of Bibb, on the second Monday in November next; and also, that you bring with you and produce, at the time and place aforesaid, the original grant of the State of Georgia to John S. Roberts, to lot of land No. 68, in the 4th district of originally Houston, now Bibb County, dated February 9th, 1822; also, a deed from said Roberts to Samuel Farmer to said lot of land, of same date; also, any deed which said Farmer may have made to said lot, to Thomas Rainey or any other person, and all deeds he may have in his possession or under his control, showing that Thomas Rainey held title to said land, in the years 1828 and 1829, then and there to testify and show all and singular these things or the said grant and deeds doth import, of and concerning a certain action now in our said Court depending, wherein Willis McR. Russell *et al.* respondents, vs. Willis Wood and William Johnson, appellants. And this you are not to omit, under the penalty of three hundred dollars.

Witness, the Honorable ABNER P. POWERS, Judge of said Court, this 25th day of September, 1824.

HENRY G. ROSS, Clerk.

Calhoun sworn: Had such deeds as described in the subpœna, but sold the land to Gray and turned over the papers;

Wood et al. vs. McGuire's Children.

thinks they are the papers mentioned in the subpoena; had a full chain down to Rainey, so far as I know. Witness also had the grant. And afterwards, Gray handed me a bundle of papers to be delivered to Stubbs & Hill, saying that he had a suit about the land.

Cross-examined: Can't say that I had a deed among those papers to Rainey; can't say that I ever heard of a deed from any one to said Rainey.. When I sold the land to Gray I delivered to him all the papers that I received from McGuire, together with a deed made by Lovick N. McGuire and Abraham B. McGuire, to me, for the land in dispute, all of which I delivered to Benjamin H. Gray; when I sold him the land; and after this suit began, I received a bundle of papers from Gray to deliver to Stubbs & Hill, which I delivered to them without even opening the package or knowing what papers it contained, except that they were papers pertaining to the land now in suit. Had none of these papers when I was served with the subpoena, nor were they in my power, custody or control, nor have I now.

Plaintiff then read the deed from Lovick N. McGuire and Absalom B. McGuire to Calhoun, as follows:

GEORGIA—BIBB COUNTY:

This indenture, made the seventh day of December, in the year of our Lord, one thousand eight hundred and thirty-seven, between William H. Calhoun of the one part, and Frank N. McGuire and Absalom H. McGuire, as parent, of the other part, all of the State and County aforesaid, witnesseth, that the said Frank N. McGuire and Absalom B. McGuire, for and in consideration of the sum of seven hundred dollars, to them in hands paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged; hath bargained, granted and sold, alienated, conveyed and confirmed, and by these presents, do grant, bargain and sell, alien, convey and confirm unto the said William H. Calhoun, his heirs and assigns, all that tract or parcel of land lying and being in the fourth district of Houston, now Bibb County, known

Wood et al. vs. McGuire's Children.

as lot No. 68, and bounded by lots Nos. 47, 67, 85 and 69, which said lot or tract of land was drawn by John S. Roberts, in a land lottery in this State, containing 202½ acres, be they more or less, to have and to hold the said lot or tract of land, with all and singular the rights, members and appurtenances thereof, whatsoever, to the said lot or tract of land, being, belonging or in any way appertaining, with the remainder or remainders, reversion or reversions, rents, issues and profits thereof, to the only proper use and benefit and behalf of him, the said William H. Calhoun, his heirs, executors, administrators and assigns, in fee simple. And the said Frank N. McGuire and Absalom B. McGuire, as parent, their heirs, executors and administrators, the said bargained lot or tract of land, unto the said William H. Calhoun, his heirs, executors, administrators and assigns, against the said Frank N. McGuire and Absalom B. McGuire, their heirs, executors and administrators, and all and every other person or persons, shall and will warrant and forever defend, by virtue of these presents.

In witness whereof, we have hereunto set our hands and affixed our seals, the day and year above written. Signed, sealed and delivered in presence of us.

his
LOVICK N. & McGUIRE, [L.S.]
mark.

ABSALOM B. McGUIRE, Parent, [L.S.]

Test,

T. M. TOPLEY,
AXUM S. ALFORD.

Plaintiff then read, under like notice to defendant, a deed from said Wm. H. Calhoun for the premises in dispute, to Wm. H. Gray, dated 14th Dec. 1847, duly executed. Consideration \$1000—clear warranty deed.

Plaintiff then read, under like notice, to defendants, a bond for titles, executed by Benjamin H. Gray, to Wm. Johnson, one of the defendants, a bond conditioned to make warranty

Wood et al. vs. McGuire's Children.

titles to said land in dispute upon the payment of \$1200—said bond dated 17th day of October, 1850.

Plaintiff then read an agreement of Counsel as evidence to the Jury, which agreement is as follows:

We agree, for the purpose of this trial, to receive as evidence the testimony of Absalom Jordan and Wm. Burtele, on a motion for a new trial.

Also, that Calhoun purchased the land in 1837, then went into possession, and Calhoun and those claiming under him have held possession up to this time, and are now in possession, and that Absalom Jordan would swear, if present, that said lands were not worth more than \$700, the amount paid by Calhoun, at the time of the purchase.

LANIER & ANDERSON, Plaintiffs' Atty's.

STUBBS & HILL, Defendants' Atty's.

Wm. Johnson sworn, one of the defendants withdrawn by plaintiff: Willis Wood, my co-defendant, claims under me; I purchased from Benj. H. Gray and paid and am to pay \$1200 for the land. The sum expressed in the deed is the true amount. I bought in good faith and paid a fair price. I supposed I was buying a good title and did not know of any outstanding title. Gray was in possession at the time, and I supposed I was getting an unencumbered title—large portion of the fence was burnt up—putting the plantation in repair was worth two years' rent. There were twenty to twenty-five acres cleared, worth for rent \$2 to \$3 per acre. The balance of the land I cleared—worth the rent to clear it—not more than two and a half acres out of the swamp. Willis Wood held and occupied about five acres of the land that was cleared. Wood holds half the lot and I the other half. I sold Wood the West half and I occupy the East half.

Rebuttal: I have heard a rumor in the settlement, some years since, that the McGuires had a claim on the lot, as I supposed, but had not certain knowledge of it.

Defendants' Counsel then offered to ask, and requested the Court to be permitted to rebut as to certain when it was that he ever heard such rumor, and wished to allow by the wit-

Wood et al. vs. McGuire's Children.

ness that the plaintiffs knew of the possession by Gray, and had not asserted any title by suit, and had no title upon record and to explain what he meant by rumor. The Court refused Counsel to ask any question to explain the testimony drawn out by plaintiffs on rebuttal, and ruled and determined that the examination of the witnesses was closed. To which ruling defendants then and there, by their Counsel, excepted.

Abner Rainey, sworn: Plaintiffs then offered to prove by the witness that after McGuire had left the premises and in no way exercising acts of ownership over the land, that he, Absalom B. McGuire, admitted that he held the land in dispute for his children.

Defendants objected to the sayings of McGuire, because he was not in possession, and it did not appear that he, Absalom B. McGuire, had either title or possession at the time such admission was made (if any was made). The Court over-ruled the objection and Rainey said:

McGuire admitted to witness, frequently, between the years 1831 and 1837, that the land in dispute belonged to his children, under the will of their grand-father. McGuire was not in possession at the time. To which ruling and decision, defendants then and there excepted. The sayings of McGuire were not given in evidence until all the above and foregoing evidence was given in to the Court and Jury.

Peter M. Curry, sworn: Absalom B. McGuire moved to the land in 1831 or 1832, and remained on it for two or three months in a small cabin.

Testimony of Mrs. Milly McGuire: To Intg. 1st.—I know the plaintiffs but do not know the defendants.

To Intg. 2d. I am the mother of the wives of McDonald and Russell, and also of the other plaintiffs. Absalom B. McGuire, my husband, was the father of the same. Their grandfather on mother's side was named Thomas Rainey. They are the children of Milly McGuire, and are as follows: Frank N. McGuire, aged about thirty-eight; Mary Elizabeth McGuire, aged about thirty-two years old; Ona F. McGuire, about twenty-nine years old; Jemima K. McGuire, about twenty-six

Wood *et al. vs.* McGuire's Children.

years old; Daniel J. McGuire, about twenty-four years old; Jacob R. McGuire, about twenty-two years old; Rebecca A. W. Russell, about nineteen years old; Sarah Ann McGuire, about fourteen years old; Judith H. McGuire, about eleven years old, all of whom are yet living. None dead, leaving children. Ona F. McGuire was married to George M. McDonald, the fifteenth day of July, Eighteen Hundred and Forty-five, and Rebecca A. W. McGuire was married to Willis M. K. Russell the ninth June, 1850.

To Intg. 3d: That Thomas Rainey was the grand-father of said children, and he lived in the year 1827 or 1828 about one mile from Lawrenceville, in Gwinnett County, Georgia. He is not now living. He died about the sixteenth November, 1828, at his residence, one mile from Lawrenceville, in Gwinnett County, Georgia. Milly McGuire is the daughter of Thomas Rainey. Milly McGuire is my name; I am Thomas Rainey's daughter, to the best of my knowledge.

To the 4th: In Eighteen Hundred and Twenty-seven and Twenty-eight, I lived in the County of Walton, Georgia. I have resided in Bibb County, Georgia, since that time until I moved to this, Thomas County.

To the 5th: I did live in Bibb County, Georgia—moved there some time in the year 1829, and lived about ten miles from Macon in a Westerly direction, on the road leading from Macon to Montpelier Springs. The land I resided on was joined by a Mr. Asby and Mr. McManus; Absalom B. McGuire was my husband. He is not now living. He was the father of the plaintiff. Some time in the year Eighteen Hundred and Twenty-six, my husband was possessed of the control of some land in Bibb County, Georgia, in right of plaintiff as his children, and held the title in right of said children above twelve years. He had not, before that time, the control of said land for any other person. I cannot tell the number of the lot, nor the district in which it lay; it was in Bibb County, Ga.; said land lies immediately on the Tobeoffkee Creek, was joined by Sampson Barefield's land, Wm. Scott's land and Thomas Howard's land.

Wood *et al.* vs. McGuire's Children.

To the 6th. My husband was named Absalom B. McGuire, and he sold said land to one William C. Calhoun. I cannot state the month, but to the best of my recollection, he sold it some time in the year 1839. I was not present when the sale was made, but I afterwards heard Mr. Calhoun say to Mr. McGuire, that he would come and get title when the children became of age.

To the 7th. Absalom B. McGuire only lived on said land about two months, but held titles, as before stated, about twelve years. He never held said land as his own right.

The 7th. I know nothing more that will benefit the plaintiff, but that Mr. McManus told Mr. Calhoun that the title to said land was in his children, and Mr. Calhoun replied that he would risk it.

her
MILLY ✕ McGUIRE.
mark.

CHARGE OF THE COURT:

After argument of Counsel, the Court was requested, by defendants, in writing, to charge the Jury:

If you believe from the evidence, that Calhoun and those under him in the actual possession of the land, cultivating and exercising acts of ownership over it as their own, under deed to the land, were in possession more than seven years, and there was no disability on the plaintiffs, as to minority or other disability, then the plaintiffs were not entitled to recover.

And you will look to the evidence, and see from that, whether the plaintiffs were of full age for more than three years before the commencement of this suit. And if all the plaintiffs had attained twenty-one years, for more than three years before this suit brought, except Daniel J. McGuire, and you will inquire from the evidence, whether he was in *esse* at the time of his grand-father's death; that is, whether he was born at the time of his grand-father's death or born within the usual period of gestation thereafter; and that if not in *esse* at that time, he,

Wood et al. vs. McGuire's Children.

Daniel J. McGuire, is not entitled to recover; and if you believe that defendants and those under whom they claim, have been in such adverse possession, then the defendants are protected by the Statute of Limitations, and you will find for defendants. Which said request, the Court refused to give, (except so much thereof as relates to Daniel J. McGuire which was given as requested by defendants.)

To the refusal to charge the balance of said charge, the Counsel for the defendant then and there excepted.

The Counsel for defendants requested the Court to charge:

Where a purchaser of lands, without notice of any fraud or defect of title, purchases from one affected with notice, the purchaser will be protected. Which the Court refused, "alleging that it was not applicable to the case under the evidence."

To which said refusal to charge, the Counsel for defendant then and there excepted.

Defendants' Counsel then requested the Court to charge the Jury—If it is not in proof before you, that Benjamin H. Gray had notice of some fraud or defect in the title, then you must find for defendants. Which the Court refused, alleging that it was not applicable to this case. And defendants excepted.

The defendants' Counsel then requested the Court to charge the Jury—If the Jury should believe that defendant, Wood, was never in possession of but one half of the land, and held the same in severalty, then their verdict for the whole premises and mesne profits, cannot be found against him. Which charge the Court refused to give, as not being applicable to the case. To which refusal to charge defendants' Counsel excepted.

The plaintiffs' Counsel requested the Court to charge the Jury—

1st. That if they believe Absalom B. McGuire and Calhoun admitted titles in plaintiffs, such admission makes said McGuire and Calhoun hold subordinately to plaintiffs, and plaintiffs are entitled to recover, as against them and against Gray and defendants, if the latter claim under said Calhoun and McGuire.

2nd. If the Jury believe that Absalom McGuire, Calhoun

Wóod et al. vs. McGuire's Children.

and Gray, and the defendants, all took with notice of plaintiffs' title, plaintiffs are entitled to recover.

3d. That if Absalom B. McGuire and Calhoun admitted plaintiffs' title, their possession is plaintiffs' possession; and if Calhoun held thus from 1837 to 1847, plaintiffs have a good Statutory title.

Not given in charge.

4th. That if Daniel J. McGuire, one of the plaintiffs, was born within the usual period of gestation, after the death of the testator, that he is equally entitled, under the will, with the other plaintiffs.

(To this, the 4th request of plaintiffs to charge, defendants took no exception, considering it sound law.)

5th. That if the verdict of the Jury be in favor of the plaintiffs, and Daniel J. McGuire is not of the requisite age to take under the will, there being but four other plaintiffs, they are each entitled to one fourth of the land; it being conceded that Lovick N. McGuire, one of those four heirs, sold his portion, plaintiffs are entitled to recover three fourths of the land.

All of which said charges, as asked for by the plaintiffs, the Court gave as above stated, except the 3d; and to each and all of which, the defendants then and there excepted, except as to the 4th request of plaintiffs, to which no exception is taken.

The Court, after giving in charge to the Jury the request of Counsel as given to them in charge, and the refusal to give other requests in charge, proceeded to charge the Jury as follows:

1st. The Court charges you, that "a party deriving title from another, mediately or immediately, is bound by admissions made against that title by the latter, while the title was in him."

You will inquire, from the evidence, whether Absalom B. McGuire or William H. Calhoun, while in the possession of said land, and exercising acts of ownership, and whilst they or either of them had so claimed title to the land, made any admission that the title to the same was in plaintiffs. If so, the

Wood *et al.* vs. McGuire's Children.

defendants claiming under them or either of them, are bound by said admissions, if any such was made.

2d. The Court charges you, that a plaintiff in ejectment, must recover upon the strength of his own title, not upon the weakness of his adversary's title. But the Court charges, that a party deriving a title or pretending to derive a title from a particular fountain, that is an admission by the party, that said fountain is a good title as to such party, deriving or pretending to derive a title therefrom. You will inquire from the evidence, whether the defendants and those through whom they claim, derive their title, or pretend to derive their title to said lot, from and by virtue of the last will and testament of Thomas Rainey, deceased. If so, it is an admission, on their part, that Thomas Rainey had a good title to said land, at the time of his death, and that he has a right to will and bequeath the same, and that the plaintiffs are not bound to go behind the last will and testament of Thomas Rainey, deceased. You will then inquire from the evidence, whether the defendants and those through whom they claim, have a perfect title to said land, as derived from the last will and testament of Thomas Rainey, deceased; if you find that they derive or pretend to derive their title through and by said last will and testament; if so, you will find for defendants. But should you find, from the evidence, that the plaintiffs derived their title to said land from the said last will and testament of Thomas Rainey, deceased, and that they have not parted with their title, and that both parties rely on the bequest to the children of Milly McGuire, then you should find for such of the plaintiffs as are entitled thereto under said will, and who have not parted with their right or title thereto.

It being conceded by both parties that Lovick N. McGuire, one of the legatees under the will of Thomas Rainey, deceased, has parted with his interest in said land, you cannot find in his favor, but you will find against him.

3d. The Statute of Limitations is also relied on for the defendants.

The Court charges seven years adverse possession will gene-

Wood et al. vs. McGuire's Children.

rally bar a right of action. But the Court charges you, that you will inquire from the evidence, whether Absalom B. McGuire or Wm. H. Calhoun, whilst they had possession of said land and claimed title to the same, acknowledge that the title to said land was in plaintiffs, and that if they had knowledge of the same, that the Statute of Limitations did not commence to run against the plaintiffs till the sale of said land to a purchaser without notice of said title; then you will inquire at what time Absalom B. McGuire and Wm. H. Calhoun sold said land to an innocent purchaser without notice if such sale did take place, and from such period the Statute of Limitations commenced to run in favor of defendants only; and if seven years have elapsed since such sale, if any, to the innocent purchaser, without notice, and such purchaser and those claiming under him have been in possession seven years adversely, you will find for the defendants. But should seven years not have elapsed since the sale by a vendor without notice and title of the plaintiff, and an acknowledgement of the same, you will find for plaintiffs, if you believe that plaintiffs have established their title to said land.

4th. It has also been urged by the Counsel for defendants, that a verdict could not be rendered against both defendants if they held in severalty. The Court charges you that several defendants may be joined in an action, when the title of the plaintiffs in respect to all is the same, although the possession is several and not joint, and each of the defendants may be found guilty for the part in his possession, and the plaintiffs have judgment against them severally.

The Court further charges, that no arrangement between the defendants themselves, after action brought, can defeat the right of the plaintiffs to a joint recovery; and in order to protect the defendants from a joint recovery, they must hold in severalty under different titles, and not the one from the other, and that before the commencement of the action; and that the *onus* of proof of several possessions should be made out by defendants.

5th. The Court charges you, that if you should find for the plaintiffs, or any of them, that you must be satisfied that each

Wood et al. vs. McGuire's Children.

plaintiff was born or was in *esse* at the death of the testator, Thomas Rainey, dec'd, and as many of the children of Milly McGuire as were in *esse* at the death of the testator, are entitled to recover, if at all, and you will find in favor of such plaintiffs their undivided proportionable share of such land and ~~meone~~ profits, if any, accordingly. Lovick N. McGuire having sold, you can find and must find against him. And the Court gave no other or further charge.

The Court, before proceeding to charge the Jury, announced to Counsel on both sides, that if they had any request to make as to charging the Jury, they must make such requests in writing before he proceeded to charge them. In obedience to this announcement from the bench, both sides prepared requests in writing, as heretofore set out, which was given or refused, as herein before stated.

After the Court had concluded his charge to the Jury, defendants then asked leave to present other requests, prepared by their Counsel, while his Honor was delivering his charge, and considered by them to be material and important to the rights of defendants.

The Court, then, refused to hear Counsel as to their requests to charge, and the Jury retired to consider of their verdict.

To all of which said rulings, decisions, charges and refusals to charge, defendants' Counsel then and there excepted, and now assign the same for error.

STUBBS & HILL, for plaintiffs in error.

LANIER & ANDERSON; POE, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first error assigned in this case is, the refusal of the Court to allow the defendants to re-examine the witness, William Johnson.

A preliminary question is raised in the argument of this cause, as to the proper construction of the Act of 1868.

Wood et al. vs. McGuire's Children.

granting to either party in a cause the privilege of a *viva voce* examination of his adversary, in open Court. It is insisted, that inasmuch as the previous Acts authorizing discoveries at Common Law did not give the right of *cross-examination*, that neither is it conferred by the late Act, which is amendatory to the Acts of 1847 and 1849. The Act of February, 1854, provides, that "any party, plaintiff or defendant, in any action at Common Law, pending in any Superior, Inferior or Justice's Courts of this State, wishing a discovery from or on the evidence of the adverse party, on the trial of such action, may apply to the Clerk of said Superior, Inferior or the Justices of the Peace; in whose Courts said action may be pending, in case the party whose evidence is desired, reside in the county where said case is pending, for a subpoena, requiring said party to be and appear at said Court, and testify in said action as other witnesses now, by law, are required to do—which subpoena shall be personally served, 80 days before the term of the Court at which he is required to attend. And in case said party shall fail or refuse to be and appear, and testify in said action, as required, then and in that case, said cause shall be subject to the same continuances as are now allowed, by law, for the absence or non-attendance of other witnesses; and after said continuances are exhausted, said action shall be dismissed, provided it be the plaintiff who refuses to appear and testify as aforesaid; or if the party who fails or refuses to appear as aforesaid be the defendant in said cause, his plea or pleas and answers, if he has filed any, shall be stricken out and judgment given against him by default; or such other order may be taken or had in said cause, as in the discretion of said Court may be just and proper. And in the event that said parties, plaintiff or defendant, whose evidence or discovery may be required in action pending in either of said Courts, shall or may, either before, at the time or after the commencement of said action, and before the time of giving said testimony, remove or do reside out of said county in which said action is pending, then and in that case interrogatories may be filed, as is now usual for other witnesses, under the same rules and regulations as in

Wood *et al.* vs. McGuire's Children.

now required by law; and in case of refusal to answer the same, or in case they are answered evasively, the same rule or order may and shall be had as herein before provided, in case of failure or refusal to attend and answer where said parties are subpoenaed to attend in case they reside in said county." (*Dunagan's Digest*, 6.)

It will be perceived that a *party*, under this Act, when subpoenaed as a witness, is required to attend the Court and "*testify in the action as other witnesses now, by law, are required to do.*" In other words, they are placed upon the same footing, in all respects, as other witnesses. The Statute imposes no restriction—no limitation, upon their testimony or mode of examination. We do not feel at liberty, much less inclined, to do so. It is a beneficial Act, intended to facilitate the ascertaining of truth, the end of all judicial proceedings, and should therefore be liberally construed. To deny the right of cross-examination, is to emasculate the law of half its strength.

[2.] We return, then, to the main point in this exception.

Mr. Johnson, the witness, had been introduced and examined by the plaintiffs, cross-examined by the defendants, and re-examined by the plaintiffs. Upon this re-examination by the plaintiffs, the questions propounded were not confined to matter by way of rebuttal to the cross-examination, nor explanatory of his first examination. He stated, in answer to an inquiry asked of him, a new fact as to the reports in the neighborhood or county, concerning the title to the land in dispute. And the defendant's Counsel proposed to push the investigation further, as to this rumor. As for instance, when he heard it? whether before or after he acquired title? Also, as to the nature and extent of the rumor?

Was the Court right in denying to the party this privilege? Had the second examination by the plaintiffs been confined to what was either explanatory of the first, or in rebuttal of his cross-examination, the examination might have been considered as closed. But the Court having suffered this new matter to be brought out, opportunity should have been extended

Wood et al. vs. McGuire's Children.

to the defendants, to have interrogated the witness further as to this new matter.

[8.] Were the admissions of Absalom McGuire, made between 1830 and 1837, adverse to the defendant's title, competent testimony?

It is conceded, that if a party in possession of property, makes admissions against his interest, it is good evidence, both as to him and *his privies*. It is denied, however, that McGuire was either in possession of the premises or had the title thereto during that period. For the purpose of letting in this proof, we think that both of these facts may be assumed to be true. A man by the name of Roberts drew this lot of land, No. 68, in what was originally Houston, now Bibb County, and the same was granted to him in 1822. It seems that the title to this lot, after passing through several intermediate conveyances, vested in one Thomas Rainey, who, by his will, made in 1828, and admitted to record in 1829, devised the land to the children of Milly McGuire, his daughter, the mother of the plaintiffs and the wife of Absalom McGuire, under whom the defendants claim. In 1830 or 1831, the McGuire family came from the up-country and located, for a brief space of time, on this land. But being low and swampy, they soon moved out to a contiguous tract, continuing, occasionally, to cut timber off of 68, until sold by McGuire to Calhoun, in 1837.

It was during this interval that the admissions were made by Absalom McGuire, which were sought to be given in evidence; and to the effect, that the land belonged to his children, under and by virtue of his father-in-law's will.

While this kind of occupancy, on the part of Absalom McGuire, may not be deemed sufficient, in law, to constitute adverse possession as against the plaintiffs, still, it may serve and suffice to let in his disclaimer of title, in himself, during this time. But be this as it may, upon the other view of the subject the point is plain. Concede that the title to this land was not in Absalom McGuire, and it clearly was not and never was, still, the defendants claiming under him, and this fact having been fully disclosed before these admissions of McGuire were

Wood et al. vs. McGuire's Children.

offered, the defendants are estopped from denying his title. Seeking to shelter themselves under it, as they confessedly do, they must take it *cum onere*: take it incumbered with all the admissions made by their vendor respecting it, while he held it, and before he conveyed to Calhoun.

[4.] A great many points are raised upon the record, growing out of the several charges given and refused by the Court, touching the Statute of Limitations. Upon a careful examination of the facts, we must say, the case upon the proof, was fairly, not to say favorably, submitted to the Jury for the defendants. The Circuit Court held, and we think, very properly, that it appearing from the face of the deed itself, as well as the testimony of Mrs. McGuire, and from other circumstances, that Calhoun not only knew of plaintiffs' title, but recognized its validity, stating that he would risk the deed of the father, who executed the deed as parent, and the oldest son, until the other children became of age; when he would have his title perfected—we say, the Court very properly ruled, that such possession could not ripen into a title, under such circumstances; but that Calhoun took and held in subordination to the plaintiffs' title. Instead of claiming the fee and believing, *bona fide*, that he acquired it, by virtue of his purchase, from the father and the oldest child, he both knew and acknowledged the contrary to be true, and that the fee was in the plaintiffs.

[5.] It is insisted, with great apparent earnestness, by Counsel for the plaintiffs in error, that notice to the vendee, of an outstanding title, cannot affect the *bona fides* of his possession. And in general this is true. If A takes possession of land bought of B, believing that he has acquired a fee, notice of an outstanding title cannot affect him, although it turns out to be the true or paramount title. But in the case before us, there is not only notice but recognition, and this is the proper distinction, and is fatal to the Statutory title sought to be set up against this recovery.

Calhoun's possession, acquired by a purchase from the two McGuires, continued down to 1847, within five years of the

Wood *et al. vs. McGuire's Children.*

commencement of the suit, and that fact is conclusive against the bar of the Statute. Had the feoffees under Calhoun, Gray and Johnson bought ignorantly, and consequently innocently, viz: without knowledge of the defects in the original purchase by Calhoun, and held for seven years, the thing would have been different, notwithstanding Calhoun bought with knowledge. And so the Court, in substance, instructed the Jury.

[6.] It is not disputed; I believe, that where both parties derive title from the same source, that it is not necessary for either party to have title beyond that. Here, old Mr. Rainey is the *propositus* or starting point of this title, *quoad* these parties, plaintiffs and defendants. It was not incumbent upon the plaintiffs, therefore, to go back beyond him and deduce the chain, link by link, from Roberts, the grantee, to Rainey.

[7.] We approach, now, a new and interesting question. Where the defendants in ejectment claim different parcels of land under distinct titles, and do not sustain the relationship of landlord and tenant to each other, can a joint action be maintained against them, and either a joint or separate recovery be had for the premises, as well as the *mesne profits*? The Court ruled, that this might be done, and the decisions in New York fully sustain the practice. That this might be done at Common Law, so far as the recovery of the possession was concerned, and may still be the doctrine in those States where the Common Law rule has not been changed, is quite likely. In the fictitious form of action adopted from convenience, the title to the premises only was settled; and the real parties then litigated as to the *mesne profits*. Mr. Adams, however, in his standard work on Ejectment, intimates that the rule is different, even in England. (pp. 236, 237.)

In this State, *mesne profits* must be recovered in the same suit with the premises; and a subsequent action cannot be brought to recover *mesne profits*. Apart, then, from the inconvenience of complicating the defence of one defendant with that of another, can separate verdicts be rendered against them? We know of no practice to warrant it. In this case,

Wood et al. vs. McGuire's Children.

the verdict was joint for the *mesne* profits as well as the possession of the premises, notwithstanding one of the defendants, had only occupied a few acres of the land ; and the relation of landlord and tenant did not exist between them.

His Honor, the presiding Judge, charged that no arrangement could be made between the parties; after suit brought, to prevent a joint judgment. And this is true. But the proof shows that Wood bought of Johnson in 1850, whereas the action was not instituted until 1852. The defendants, therefore, held independently of each other, at the commencement of the suit. Upon the best reflection we can give this subject, and with a view to the establishment of a proper practice, we feel constrained to over-rule the direction given to this branch of the case.

[8.] We fear, too, we cannot sustain the Court in refusing to listen to the written requests to charge the Jury, at the conclusion of the general charge which he had already given. The Act of the last Legislature imposes this as an imperative duty upon the presiding Judge, and prescribes no particular time when it is to be done. And as yet, the Judges, in convention, have established no rule upon this subject. It is doubtful whether it be practicable or politic to do so. What the requests were does not appear; the record is silent upon this subject. It may have been to supply some omission; and if so, the application should have been complied with. The bill of exceptions, as it stands, places the Court in the predicament of refusing to listen to any request, regardless of its character. And to affirm this, would be to repeal the Statute.

Davis and Redding vs. The Cent. R. R. & B'kg Co.

No. 60.—BENJAMIN DAVIS, plaintiff in error, vs. THE CENTRAL RAIL ROAD & BANKING COMPANY, defendant. ROWLAND REDDING vs. THE MACON & WESTERN R. R. CO.

[1.] The Act of the 20th February, 1854, "to define the liabilities of the several Rail Road Companies of this State, for injury to or destruction of live stock, killed or injured," &c. is not in violation of the Constitution of the State.

[2.] Nor is it in violation of the Constitution of the United States.

Trespass, in Bibb Superior Court. Tried before Judge HARDEMAN, November Term, 1854.

This was a proceeding in the County of Bibb, against the Central Rail Road & Bk'g Co., for killing two mules belonging to the plaintiff.

The case turned upon the constitutionality of the Act of 1854, which authorized such proceedings against Rail Road Companies, to be had in the County where the fact occurred, and the point was brought up by the defendant's plea to the jurisdiction of the Court, which was sustained by the Court; and the Act in question was held to be unconstitutional.

On this decision error is assigned.

Proceeding to assess damages on appeal, in Monroe Superior Court. Decision by Judge STARKE, September Term, 1854.

This was a proceeding under the Act of 1854, entitled "an Act to define the liabilities of the several Rail Road Companies of this State, for injury to or destruction of live stock, killed or injured; or for destruction of or injury or damage to property other than live stock, by the running of cars, engines, &c. &c." The Rail Road Company, filed a plea to the jurisdiction, on the ground that the corporation had its residence in Bibb County, and that its President and principal officers resided there; and that all suits against them should be in that County. The Court over-ruled a demurrer to this plea, hold-

Davis and Redding *vs.* The Cent. R. R. & B'kg Co.

ing the said Act of 1854 to be unconstitutional and void. This decision is assigned as error.

PINKARD, STEVENS, HARMAN and STUBBS & HILL for plaintiffs in error.

POE, CABINESS, HAMMOND, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

These two cases were argued and decided together. In each is but a single question, and that is common to both. The Courts below, from which the cases respectively come, decided the Act of the General Assembly of the 20th February, 1854, to define the liabilities of the several Rail Road Companies of this State, for injuries done to stock, &c. by their cars, &c. and to regulate the mode of proceeding in such cases, &c. to be unconstitutional. And those are the decisions assigned as error in this Court.

Consulting convenience, I shall treat those decisions separately, beginning with that rendered in the case of *Davis against the Central Rail Road & Banking Company*.

The Court below held the Act aforesaid to be unconstitutional—was that decision right? This is the sole question.

The Act declares, in substance, that the Rail Road Companies of this State, for injuries done by them, to stock, &c. shall be liable to be sued, in the counties in which the injuries may have been committed.

This Act the Central Rail Road & Banking Company says, violates both the Constitution of the State and that of the United States—violates the part of the Constitution of the State, which is in these words: "The Inferior Courts shall also have concurrent jurisdiction in all civil cases, except in cases respecting titles to lands: which shall be tried in the County wherein the defendant resides;" and violates that part of the Constitution of the United States, which is in these words:

Davis and Redding vs. The Cent. R. R. & B'kg Co.

"No State shall" "pass any" "laws impairing the obligation of contracts."

And to show the Act to violate this part of the Constitution of the State, the argument of the Rail Road Company is as follows:

This part of the Constitution, declaring that no person shall be sued elsewhere than in the county in which he resides, declares, in effect, that the county in which a person resides is to be ascertained by the law of residence, in force at the time of, the declaration i. e. at the time of the making of the Constitution.

That that law, therefore, is not subject to repeal or change by the Legislature.

That by that law, all Rail Road & Banking Corporations reside at the place where they keep their "principal office."

That when the Act aforesaid was passed, the Central Rail Road & Banking Company kept its principal office at Savannah, in the County of Chatham.

That, therefore, when the Act was passed, the Company, by that irrepealable law, resided in Chatham; and so, by the Constitution, was subject to be sued only in Chatham.

But that notwithstanding this, the Act of the Legislature aforesaid, says either this, I repeal that law which makes the residence of a rail road corporation the place at which it keeps its principal office; and henceforth, wherever such a corporation injures stock, &c. there I make its residence to be, and there I make it suable.

Or this—I do not repeal that law; and yet, wherever such a corporation injures stock, &c. there I make it suable.

That whichever of these two things it is that the Act says, it does what the Constitution declares shall not be done.

And therefore, that the Act violates the Constitution.

This is the argument of the Rail Road Company.

In this argument, one of the propositions is, that by the law as it existed at the time of the making of the State Constitution, the place of residence of a Rail Road Corporation, is the place at which it keeps its principal office; and this proposi-

Davis and Redding *vs.* The Cent. R. R. & B'kg Co.

tion, it was insisted, is sustained by several decisions, and among them the decision of this Court, in the *The Central Bank vs. Gibson*, (11 Ga. R.)

But this is not the proposition which that decision goes to sustain. The proposition which that decision goes to sustain is this: that if the charter of a bank says, the bank shall be established at a particular place, *the charter, itself*, means to say that the bank shall be a resident of this place. In other words, the decision is, that if the Legislature plainly says, a corporation's residence is to be at a particular place, its residence is to be at that place. But it is not the decision, that if the charter of a bank says only, that the bank is to have its "principal office" at a particular place, the charter says, in effect, that the bank shall be a resident of that place, much less is it the decision that this is so, when the charter is the charter, not of a bank, but of a rail road. NISBET, J. who delivered the opinion, seeming to speak for himself alone, it is true, says that if the charter had not determined the locality of the bank, he should have held it a resident for the purposes of a suit in the county in which was its place of business. But in what county is the place of business of a rail road? Is the business of a common carrier done in a house? What would have been his Honor's opinion on this point, does not appear. This, however, is what his Honor says, when apparently speaking for the Court. However plausible the idea may be, that a corporation, an intangible entity, deriving its existence and all its functions from the Legislature, and possessing no personality, is ubiquitous within the limits of the State, in the absence of any designation of its locality; yet, in this case it has no application, because the *charter* of the Central Bank fixes its locality at *Milledgeville*—there, therefore, it is suable—*there* it is made by law commorant. It is an artificial person, *resident* by legislative enactment, at *Milledgeville*. The Charter provides "that a bank shall be established in behalf of the State of Georgia at Milledgeville, in said State, to be known and called by the name and style of the Central Bank of Georgia." (*Prince*, 72.) This seems to be conclusive of this question,

Davis and Redding *vs.* The Cent. R. R. & B'kg Co.

The provision in the charter of the Central Rail Road and Banking Company is this: "The principal office of the said Company shall be located at Savannah, with subordinate offices or agencies at Macon and such other places as the board of directors shall determine, and all elections and meetings of stockholders shall be held at such principal office only." This is not the same as would have been a provision, that the corporation "shall be established" "at" Savannah.

And to say that a person's office of business shall be at a particular place, is not necessarily to say that the person's residence shall be at that place. There is a Statute which declares, that the Clerks of the Superior and Inferior Courts and of the Courts of Ordinary shall keep their offices, books and papers, at the court house of their respective counties, or within one mile thereof: but did any body ever think that this was saying that the courthouse, or some place within a mile of it, was to be the residence of those clerks? On the contrary, the implication is, that though these Clerks may reside anywhere, they must keep an office at the court house. (*Cobb's Dig.* 199.) The proposition, then, is not established by this case.

Another of the cases which it was argued gave the proposition support, was that of the *Louisville Rail Road Company vs. Letson* (2 *How.* 558.) The decision in that case was, that a Rail Road corporation is a "citizen" of a State; and to be that, the decision had to over-rule two other decisions previously made by the same Court, viz: *Bank U. S. vs. Deveaux*, (5 *Cranch.* 91.) *Com. B'k of Miss. vs. Slocomb*, (14 *Peters*, 60.) And of these two decisions, the former was a leading one—was made after argument elaborate and able—argument, in which Binney, and Key, and Harper, and Ingersoll, and Adams took part. In a case thus argued, the Court could not tolerate the notion that a corporation is a citizen—it could go no further than to say, in effect, that a corporation is a partnership, and that in partnerships the individual members may be citizens. The Court had to go this length to get jurisdiction, and truly this was going a great length for jurisdiction or for anything else—much too far, I shall not dispute.

Davis and Redding vs. The Cent. R. R. & B'kg Co.

The case aforesaid of the *Rail Road Company against Letson*, however, over-ruled these two cases and decided a rail road corporation to be a citizen of a State. That decision, too, had to be made to enable the Court to get jurisdiction; and although it may be thought to go fully as far for that as the cases over-ruled had gone for it, yet the decision goes no part of the way towards showing that the place of residence of a corporation is the place where it keeps its principal office. That decision merely said that the rail road corporation in question in the case, was an inhabitant and a citizen of the whole State of South Carolina.

Another of the cases referred to as supporting the proposition aforesaid, was *Cromwell vs. Ins. Co. 2 Rich, (S. C.) R. 512.* But that case is not in point.

The cases then cited by the defendant in support of the proposition, are not sufficient to support it. Let it be borne in mind what the proposition is, viz: that the residence of a rail road corporation, is where it keeps its principal office.

With respect to this proposition, there is, however, something more to be said.

The decision in *Rex vs. Gardner, Cowp. 79* is, that a corporation, seized of land in fee for its own profit, is within the meaning of the Statute 43 *Eliz. c. 2*, inhabitants or occupiers of such lands, and in respect thereof, liable in its corporate capacity to be rated to the poor. And Lord Coke, in his exposition of the Statute of the 22 *Hen. VIII, c. 5*, says: "Every corporation and body politic residing in any county, riding, citie or towne corporate, or having lands or tenements in any shire, riding, city or towne corporate *quae propriis manibus et sumptibus possident et habent* are said to be inhabitants there within the purview of this Statute." (2 *Ins. 703.*) And he derives the word inhabitant from the word *habeo*, and says that wherever a man *has* lands he *inhabits*; that if the man *has* lands in different places, he is an inhabitant of all of the places. (*Id. 702.*) His words are, "although a man be dwelling in an house in a forraigne county, siding city, or towne corporate, yet if he hath lands or tenements in his own possession, and

Davis and Redding vs. The Cent. R. R. & B'kg Co.

manurance in the county, siding, citie or towne corporate where the decayed bridge is, he is an inhabitant, both where his person dwelleth and where he hath lands or tenements in his own possession within this Statute. *Nota, habitatio dicitur ab habendo, quia que propriis manibus et sumptibus possidet et habet ibi habitare dicitur.*" Inhabitants is the only word used in the Statute.

According to these authorities, certain corporations, for the limited purpose of a liability to taxation under these two Statutes of *Henry VIII.* and *Elizabeth*, are to be considered as capable of being "inhabitants"—capable of being "occupiers," and as actually being "inhabitants" or "occupiers," in all places in which they have lands or tenements. What Lord *Coke* meant by the word "residir.g," is not clear. He may have meant that every corporation is to be considered as residing in a county whose head resides in the county, or whose managers, or whose members reside in the county, or whose business or whose chief business is carried on in the county, or whose charter says, that it shall reside in the county. What is clear, however, is, that corporations, for the purpose of being taxed under these two Statutes, were held to be inhabitants of every place in which they had lands or tenements.

And if there is any English authority going to show that corporations are capable of being inhabitants, occupiers or residents, under any rule of the Common Law, or under any other Statutes than these two, or under these two, for any other purpose than that of a liability to be taxed, I am not aware of the authority.

Let it be admitted, however, that the English law was such, that under it corporations were not only capable of being inhabitants and residents, for all purposes, but were actually inhabitants and residents, for all purposes, in all places in which they either had lands or tenements, or in which they did business. Let this be admitted to have been the English law.

Then, it follows, that this is the law which Georgia adopted, when she adopted the English law generally. And it may be

Davis and Redding vs. The Cent. R. R. & B'kg Co.

assumed, that the law on this subject—the residence of corporations, which Georgia adopted, was the law which was in force within her limits, at the time when she was making her Constitution, and was therefore the law which she had reference to, if she had reference to any existing law, as the law for ascertaining the residence of corporations.

But this law is very different from what is assumed in the proposition of the defendants under consideration, to have been the law. In that proposition, the law is assumed to have been, that a corporation's residence, is at the place at which it keeps its principal office; or say, at which it does its chief business, and at no other place. This law is, that a corporation's residence is not only at the place at which, it keeps its principal office, but also at any place where it has lands or tenements.

And if this was the law which the Constitution had reference to, and which, if any, it impliedly declared irrepealable, the Act of the Legislature in question cannot be in conflict with the Constitution, for that Act, in providing that rail road corporations may be sued wherever, by their engines, &c. they kill stock, does no more than provide that they may be sued wherever they have lands—they having lands wherever their engines go; and so, does no more than provide that they may be sued where they reside.

But, indeed, it is not to be conceded, except for the sake of argument, that this was ever the English law, or that if it ever was, it was adopted by Georgia. Even if Georgia adopted the two Statutes of *Henry VIII.* and *Elizabeth*, together with the interpretation put on them, that they extended, by the use of the words, "inhabitants" and "occupiers," to corporations, there is much evidence going to show, that outside of these Statutes, she considered corporations as not being "inhabitants" or "residents."

1. In a similar Statute, of her own—the Statute of 1821, to authorize the Justices of the Inferior Courts to levy extraordinary taxes for county purposes, she uses the word *inhabitants*, ~~occupiers~~, ~~stating~~ that the Justices of the Inferior Courts shall have

Davis and Redding vs. The Central R. R. & B'kg Co.

power "to levy, upon the inhabitants of any county in which the said Justices may reside, a tax, extraordinary of the general State tax." (*Cobb's Dig.* 184.) And yet, this power, as far as I know or believe, has never been considered as authorizing the Justices of the Inferior Courts to tax banks, rail roads or other corporations, although it is a power that authorizes them to tax all "*inhabitants*." Have banks and rail roads ever paid tax under this power? Have they ever paid the tax, either in the county in which they had lands—in which they were therefore inhabitants, if holding lands could make inhabitants, or in the county in which they had their chief office? Never, in either, I think. If they never have the inference is pretty strong, that the word "inhabitants," in this Statute, was not intended to include corporations. The Statute is over thirty years old. It is true, that the charters of some of these corporations may, perhaps, exempt the corporations from this tax; at least, as far as their stock is concerned.

And if this be the interpretation which Georgia puts upon the word "inhabitants," in a Tax Statute of her own, the effect, may, perhaps, be thought sufficient to overbalance the effect of the opposite interpretation, which Lord Coke puts upon the word in the English Statute.

2. And the notion, that corporations have not been considered, in Georgia, inhabitants or residents of any particular county or place, derives support from the nature of several of her general Tax Laws. Thus, the Act of 1817, providing for a tax on bank stock, makes the tax returnable and payable, not to the Tax Receiver and Collector, respectively, of *any county*, but to the Treasurer of the State. (*Cobb's Dig.* 1063.)

The same thing, as to stock in the steamboat company, is done by the Act of 1821. (*Cobb's Dig.* 1064.) And as to the stock in rail roads, by the Act of 1850. (*Id.* 1079.)

Whereas, the Act of 1830, (*Id.* 1067,) which is made for private bankers, &c. provides that such bankers, &c. shall make their tax returns and payments to the Tax Receivers and Tax Collectors of the counties; and thus, seems to say, that

Davis and Redding *vs.* The Cent. R. R. & B'kg Co.

as to them, they stand on a different footing from that of incorporated banks, and are inhabitants and residents of the counties, like any other natural persons are.

If the true interpretation of these State Statutes be, that they do not include corporations, though they use the word "*inhabitants*," a foundation is laid for an inference, more or less strong, that the true interpretation to be put upon the Constitution, though it uses the cognate but narrower word, "*resides*" is, that the Constitution does not include corporations.

But at least this much may be said with confidence: that from these Statutes no argument is to be drawn in favor of the proposition, that a corporation resides in the particular place in which it does its business.

3. On the other hand, the practice of suing banks in the counties in which they do their business, may be thought to furnish an argument in favor of the notion, that banks reside in those counties. The argument, however, will not bear examination; for why is it that suits are brought against banks in such counties: Because they are the counties in which banks do their business? No—but because they are the counties in which the presidents or heads of the banks reside. These reside at the places at which the banks do their business; and it is upon them that suits against the banks have to be served.

At least, this was so until lately. If it had been the law, that banks resided where they did their business, a different sort of practice would have grown up, viz: a practice of serving suits on banks by the leaving of a copy of petition and process at the place at which they did their business; for it has been lawful to serve defendants by the leaving of such copy at their residence, almost ever since Georgia became a State—ever since the passage of the Judiciary Act of 1778. (*Watk. Dig. 220.*)

Recently, however, the law in this respect was changed. In 1845, the General Assembly passed an Act declaring, that "process necessary to the commencement of any suit against any corporation," "may be executed, by leaving the same at

Davis and Redding *vs.* The Cent. R. R. & B'kg Co.

the place of transacting the usual and ordinary public business of said corporation," &c. And the fact, that this Act was passed, is evidence that the Legislature thought the place of business of a corporation, not to be the place of its residence. Else, why pass the Act.

And did the Legislature mean, even by *this* Act, to say, that the place of business is the place of residence? The terms of the Act are consistent with that idea, but then they are by no means inconsistent with the idea, that the Legislature intended nothing about residence—with the idea, that it considered corporations as not "inhabitants"—as not residents,—as not at all within the word of the Constitution—resides—and so, not inconsistent with the idea that the Legislature considered them as subject to be made suable at such place as it might see fit to appoint.

One thing, however, is clear, and that is this: if it was by this Act that the place of business of corporations, became also their place of residence, equally; by another Act, another place may become their place of residence—in other words, it is clear, that what shall be the place of residence of a corporation, is a question over which the Legislature has power.

Upon the whole, we avoid expressing an opinion as to whether the defendant's proposition is true or not—the proposition, that the place of residence of a bank or rail road corporation, is the place at which it keeps its principal office, or does its chief business. The decision we make, turns upon another point—one as to which we have a clear view.

It may not be improper, however, that I say for myself, that I incline, very strongly, to the opinion, that corporation defendants, are not included in the words of the Constitution—the words "cases" "which shall be tried in the county wherein the defendant resides."

When these or words of the same import were first used by the State, there were not, as I think, in existence, in the State; any corporations liable to suit; and so, not in existence any to be of the defendants, that were in the contemplation of the makers of the Constitution, when they said, defendants were to

Davis and Redding vs. The Central R. R. & B'kg Co.

be sued in the county in which they resided. The words were first used in the Constitution of 1777.

In the view we take of the case, it may be conceded, that a corporation has residence, and that that residence is its place of business; and yet, the Act in question be constitutional.

Do the words of the Constitution, "which shall be tried in the county in which the defendant resides," mean to say, that the county in which a defendant resides, is to be ascertained, only by the law in force at the time of the making of the Constitution—that the law of residence, at that time in force, shall not be subject to alteration or repeal by the Legislature, as it is insisted by the defendant in error they do? In the opinion of this Court they do not.

The words are satisfied, if the defendant be sued in that county in which he has been made to reside, by an Act of the Legislature. When, by a Statute, he has been declared to reside in a particular county, and he is afterwards sued in that county, why is he not sued "in the county in which" he "resides?" Had the words of the Constitution been, "which shall be tried in the county in which the defendant resides—his residence to be determined by the law now"—(i. e. the time of the making of the Constitution,) "in force"—then, power over the law of residence would have been taken from the Legislature. But these are not the words. And what reason can there be, why the power of the Legislature over residence, as it respects defendants to suits, should be taken away, and yet, the power be left over residence, as it respects voters, road hands, militia men—persons in all other relations or capacities?

The sort of interpretation that would take from the Legislature power over the law of residence, applicable to defendants, would equally take from it power over the law regulating county lines. The same Constitution declares, that all criminal cases, with some exceptions, "shall be tried in the county where the crime was committed;" and that all cases respecting titles to lands, "shall be tried in the county where the land lies." But has the Legislature, by this, been deprived of power to say, after the time when a crime has been com-

Davis and Redding *vs.* The Cent. R. R. & B'kg Co.

or when a cause of action for land has arisen, that the county in which the crime was committed or the cause of action arose, should have an addition made to it here, or a subtraction from it there—should be divided into two counties? And yet, any change of this sort, made in the county, produces a change in the state of things, on which the fate of the suit is to depend. It adds to or diminishes the number of persons from whom the Jury is to be got—may alter the mode of reaching witnesses, and may make other changes affecting the suit.

It has never been thought, that by these words, the Legislature has been deprived of any power over county lines. And the power over county lines is one which the Legislature has exercised as often, perhaps, as it has any other. So, too, the Legislature has felt itself empowered to say what is residence, and it has said what it is. This it has done in a general Act, entitled "An Act to more fully define the legal residence of citizens and inhabitants of this State." That is the Act of 1838. (*Cobb's Dig.*: 530.) The power of the Legislature to pass this Act, has never been questioned. This Act relates to the residence of natural persons; but if the Legislature have power over the law of residence as to natural persons, they must, at least, equally have power over the law of residence, as to artificial persons.

This Act may be thought, perhaps, to throw some light on the question discussed in the first part of this opinion. The title of the Act is more fully to define the legal residence of citizens and inhabitants of this State—that is to say, of all who are citizens and inhabitants of this State. The preamble is equally broad. And yet, the body of the Act restricts itself to defining the residence of natural persons, as if the opinion of the Legislature was, that natural persons had a residence, but that artificial persons had none.

Upon the whole, what we think was meant by the part of the Constitution in question, is this: that all civil cases are to be tried in the county in which the defendant resides—the county in which he resides being to be ascertained by the law of residence, which may happen to be in existence at the time

Davis and Redding vs. The Cent. R. R. & B'kg Co.

when the case arises, or perhaps, at the time when the case is to be tried.

Having this view of this part of the Constitution, we of course have to regard the subject of residence, whether of natural persons or artificial persons, as within the power of the Legislature.

That being so, the question left, as to the Statute's being a violation of the State Constitution, is, whether the Legislature intended, by the Statute, to say, that the residence of rail road corporations, for the purpose of a liability to suit, should be deemed to be in the places in which, by the Statute, it authorized suits against such corporations to be brought.

The Statute declares, in substance, that rail road corporations shall be suable in the several counties, through or into which their rail roads pass. Suppose it had said that such corporations should be considered as residing in such counties, for the purpose of a liability to suit in the counties? If it had said this, it would, in the view which we have taken of the Constitution, have said nothing against the Constitution. And yet, what is the difference between this and what the Statute does say? In effect, it is nothing. And ought a Statute, which, in effect, differs in nothing from what would be a constitutional Statute, to be itself considered unconstitutional? Rather, in such a case, ought not every possible presumption to be made to rebut the idea, that two departments of the Government, both sworn to support the Constitution, had violated the Constitution? Most certainly. It, therefore, may be well presumed, that the Legislature, in making these corporations liable to be sued in certain places, intended to make them, for the purpose of a liability to be sued in those places, residents of the places. Especially may this be presumed, when the questions, whether corporations have residence at all—whether, if corporations have residence at all, the residence of these corporations, was not already, by the old law, in the places in which this Statute says they may be sued—places in which they had lands—places in which, being common carriers, they

MACON, FEBRUARY TERM, 1845.

Davis and Redding vs. The Cent. R. R. & B'kg Co.

must have been doing much of their business—are questions of too much doubt.

[1.] This Court, therefore, cannot say that it considers this Act to be a violation of the Constitution of the State.

Is the Act a violation of the Constitution of the United States—of the clause in that Constitution which declares, that no State shall “pass any” “law impairing the obligation of contracts.”

The argument for the defendant in error is, that the charter is a contract—that the law in existence when a contract is made, enters into the contract, as a part of it; that when the charter contract was made, there was a law in existence which rendered the place of the principal office of the corporation, the place of its residence, and another law, i. e. the State Constitution, in existence, which exempted the corporation from suit in every county, but the county in which was the corporation's principal office; that therefore, it was a part of the charter-contract, that the corporation should be sued in no other county than that in which was its principal office: but that this Statute declares the corporation to be subject to be sued in certain other counties, and that therefore it impairs the obligation of the said contract.

What has been said on the other branch of the case, shows that we consider this argument not to be good. The proposition, that the law in existence at the time when a contract is made, enters into the contract as part of the contract, may, as a general proposition, be admitted. But in the first place, the law which, in this argument, it is insisted, entered into the contract, if it be a contract, is not, in the opinion of this Court, well stated. For although it may be true, as the argument assumes it to be, that a defendant is, by law, to be sued in the county in which he resides; yet, it is equally true, as we have endeavored to show, that the county in which a defendant resides, is to be whichever one the Legislature shall say it is to be. And this being so, if any law, as to residence, entered into this charter-contract, it was not the law of residence in ex-

Davis and Redding vs. The Cent. R. R. & B'kg Co.

istence at the time of the making of the charter-contract, absolutely, but that law conditionally—that law, on condition that the Legislature should not see fit to change it.

And in the second place, even if the law were well stated, yet, it happens to be such law as constitutes an exception to the general proposition, that the law enters into contracts and makes a part of them. This law is law which concerns not the right, but the remedy. A suit is a remedy, and venue is but an incident of a suit.

The law of the venue of a suit, is more intimately related to remedy, than is the law of limitations or the law of registry; and laws of limitation and of registry have ever been held to be laws which solely concern remedy; and so, to be laws which do not enter into and become a part of contracts.

If the law of venue becomes a part of a contract, then so also must the law organizing the Judicial office, the law regulating pleading, appearance, evidence, Jury trial.

This Court was organized after the grant of the charter to this corporation was made. What jurisdiction, therefore, has it over this case, if the law that entered into the charter was, that only Courts in existence at the time when the charter was granted, were to have jurisdiction over the corporation.

[2.] This Statute, in the opinion of this Court, does not violate the Constitution of the United States.

It seemed to be assumed in the argument of the Counsel for the defendant, that this Statute imposes novel, if not oppressive terms of defence on the rail road corporations of the State.

I will say a word as to this.

The principle of this Statute is, that in certain suits against the rail roads, the venue of the suit shall be the venue of the wrongful act.

This principle is certainly not a novel one. It is the principle of the Common Law. It is a principle sanctioned and affirmed by a Statute as old as the time of *Richard II*. It is a principle which lies at the foundation of the doctrine of ve-

Davis and Redding *vs.* The Cent. R. R. & B'g Co.

nue, as practised in England up to this day. The principle rests on the maxim, that *vicini vicinorum facta presumuntur scire*—a maxim that makes the suit seek the witnesses, rather than the witnesses seek the suit.

It is true, that in the course of time, this principle has, in England, undergone modification. But the modification has been to the disadvantage of defendants. Certain actions have been permitted to become transitory—the meaning of which is, that they may be brought in *any* county. These are personal actions. And these actions, when brought in *any* county, even if it be one ever so distant from that in which the cause of action originated, have to be tried where brought, unless the defendant shall make a special affidavit that he has a witness in the county in which the cause of action arose. If he makes such an affidavit, he may, in general, have the case transferred to that county—never to the county of his residence, except when the county of his residence may happen to be that in which the cause of action arose. (*Bac. Abr. "Actions, Loc. and Trans."*)

This is the present state of the law of England. And we hear of no complaints, on the part of defendants, in England, that the law, even in this state, is oppressive upon them. But how much more oppressive a law is it than the law declared by the Statute in question. By that law the county in which the defendant is to be sued, is not to be *any* county at the option of the plaintiff—it is to be only the county in which he does the act for which he is sued. He is to be sued in that county only in which his witnesses, it is to be presumed, will be most at his command. He is merely put upon the footing on which the Common Law puts all defendants, and the footing on which our own Constitution puts all defendants in criminal cases.

That a defendant is to be sued in the county in which he *resides*—this, in truth, is the novel rule—the rule that most lacks the sanction of an old and a wide experience.

And even if the rule established by this Statute be hard upon defendants, how very much harder would any other rule be upon plaintiffs. The rule that should require the plaintiff

Barnes vs. Strohecker and another.

to bring his suit in Savannah, for the loss of a pig or a cow, would, in most cases, be equivalent to the denial of a suit at all. Plaintiffs living at distant points on the rail road from Savannah, could not afford to pay the expenses that would be incident to such a suit.

In the opinion of this Court, the judgment of the Court below, holding this Statute to be unconstitutional, ought to be reversed.

And this disposes of the case against the Central Rail Road & Banking Company.

And from that case, there is nothing to distinguish the case against the Macon & Western Rail Road.

So the same judgment, in that case, ought also to be reversed.

No. 61.—MOSES D. BARNES, plaintiff in error, vs. EDWARD L. STROHECKER and another, defendants. E. L. STROHECKER and another, plaintiffs in error, vs. MOSES D. BARNES, defendant.

[1.] When a day is appointed for the payment of money or part of it, or doing any other act, and the day is to happen after the thing which is the consideration of the money, or other act, is to be performed, no action can be maintained for the money or other act before the performance, for in these cases the doing of the act is manifestly a *condition precedent* to the payment of the money.

[2.] In some cases of mutual dependent covenants, which are conditions precedent, where several acts are to be performed, if the covenant has been in part executed, and the plaintiff has performed a part of these acts, and for the residue a compensation can be given in action for breach of covenant, then he may maintain an action without averring performance.

[3.] The Jury being out in charge of a case, the Court adjourned, giving them permission, in the hearing of Counsel, who made no objection, when they had agreed upon their verdict, to disperse, and return that verdict in

Barnes vs. Strohecker and another.

the morning. The Jury agreed upon a verdict that night, as follows: "We, the Jury, find for the plaintiff." On the next morning, when they had assembled, the Court permitted them to amend the verdict according to the statement of the foreman; when a finding for the plaintiff to the full amount of his claim was inserted: *Held*, that this was regular and proper; that the intendment of the verdict, as first agreed upon, was a general finding; that is, a finding for the whole amount of plaintiff's claim, and that the amendment was nothing more than expressing this specifically.

Debt, in Bibb Superior Court. Tried before Judge POWERS, November Term, 1854.

This was an action brought by E. L. Strohecker and Robert F. Baldwin, executor of Joseph A. White, against Moses D. Barnes, for the rent of a house in Macon called the "Winn House." The plea of defendant was the general issue and total and partial failure of consideration in this: that plaintiffs, by their contract, were bound to put certain repairs on the house by the 1st of October, 1852, when the rent was to commence; that they did not make the repairs; and that, consequently, defendant could not occupy the house. The following testimony was introduced by the plaintiffs:

Smith Terrill testified, that about the 1st of October, 1852, defendant, who was then living in a house rented from witness, requested permission to remain in it a few days longer, stating that he had rented the Winn House from the 1st of October, but that it was to have some repairs. Witness assented, and defendant did remain until the 9th of October, when he moved into the Winn House, where he remained until the 12th of October, when he left it. In the same conversation, defendant offered to exchange the Winn House for witness' house, which witness declined.

Dr. Lightfoot testified, that he saw defendant during the time he (defendant) was living in the Winn House, and that he offered to sub-let the house to witness; defendant complained that the house was out of repair, and witness heard workmen then at work in the house.

Peter Arnold, testified, that he had been employed by the

Barnes vs. Stohecker and another.

plaintiffs prior to the 1st of October, to repair the house, and went there for that purpose with other workmen, but that the woman then in possession refused to let them enter the house, and set dogs on them and drove them away.

For the defence, B. F. Griffin testified that about the last of October, 1852, he had rented the Winn House, under an agreement with both parties, and was to pay the rent to whoever lost this case; that the house and lot needed much repairing, and that White, the testator of one of the plaintiffs, told him that they had agreed with defendant to put certain repairs on it, at the time he agreed to rent it; the repairs were then not all done. Witness stated that he had heard that defendant left the house because his wife could not bear the smell of paint.

The evidence being closed, the Counsel for defendant requested the Court to charge, that if they believed that when the contract of rent was made, that the plaintiffs agreed to give possession by the 1st of October, and to make the repairs by that time, that these were conditions precedent, and if not complied with, the plaintiffs cannot recover. Defendant also requested the Court to charge, that if nothing was said as to the time when the repairs were to be made, that the law implied that they were to be made within a reasonable time; and if they were not done by the 1st of October or within a reasonable time thereafter, that the defendant had a right to abandon the contract.

The Court charged as requested on the first point, but refused to charge as requested on the second.

The plaintiff's Counsel requested the Court to charge, that the contracts for rent and for repairs were independent agreements, and that the furnishing the repairs, especially if no time was fixed for it, was not a condition precedent to plaintiff's right of action—this charge the Court refused to give; but charged the Jury according to the first point requested by the defendant; and also, that if they believed, that by going into the house the defendant had waived his right to have the repairs done as a condition precedent, that they should find for the plaintiffs. To these charges and refusals to charge, error

Barnes vs. Strohecker and another.

is assigned on different points by both parties. The Jury found a verdict, during the night, as follows: "We, the Jury, find for the plaintiff," and the Jury dispersed. This was by leave of the Court, previously given.

On next morning the Jury returned the verdict into Court, when the Court permitted them to amend the verdict, by stating the amount which they found for plaintiff; and this decision is assigned as error.

The defendant moved for a new trial, on the ground of error in the Court, in its charge, on the ground that the verdict was contrary to law and the charge of the Court, and contrary to the decided preponderance of the evidence; and also on the ground of newly discovered testimony.

In support of this last ground, he read the affidavits of Alfred Griffin and O. P. Fitzgerald, as to the condition of the house and lot in December, 1852, showing that the repairs in question had not then been made; and the defendant swore that this evidence had come to his knowledge since the trial.

The motion for a new trial was over-ruled by the Court, and this is assigned as error by the defendants; and both parties have sued out writs of error on the respective points above stated.

LANIER & ANDERSON, for Barnes.

RUTHERFORD, for Strohecker.

By the Court.—STARNES, J. delivering the opinion.

This was an agreement by Moses D. Barnes with the executors of Joseph A. White, by which the former contracted with the latter, sometime previously to the 1st October, 1852, to rent from them a house and lot in the city of Macon, for one year from that date, if the said executors would put certain repairs upon the premises; no time being specified by which the repairs were to be finished.

[1.] The reasonable construction to be placed upon such a transaction is, that the contemplated repairs were to be placed

Barnes vs. Strohecker and another.

upon the premises before the tenant was to enter, or within a reasonable time thereafter. It is to be presumed that a tenant thus contracting, stipulates for repairs of which he shall have the benefit during the whole term for which he pays, and that as a consequence, he requires them to be finished by the commencement of that term, or within a reasonable period thereafter; and of course, as a condition precedent to the payment of the rent.

If this were the contract, no action can be maintained against the tenant in this case, for that rent, unless this condition was performed; provided, the executors were not released from the agreement by any act of the tenant.

Such is the language of the elementary *dicta*, and of the cases cited by the Counsel for the executors, in these cases. The true rule being succinctly contained in the case of *Thorpe vs. Thorpe*, (1 *Salk.* 171,) as follows: "When a day is appointed for the payment of money or part of it, or doing any other act, and the day is to happen after the thing which is the consideration of the money, or other act is to be performed, no action can be maintained for the money or other act before the performance; for in these cases, the doing of the act is manifestly a *condition precedent* to the payment of the money." (12 *Mod.* 462. *Dyer*, 76. 1 *Lord Ray.* 665.)

It has been urged before us that these covenants were, in the beginning, independent of each other.

We cannot conceive how such an agreement can be regarded in this light. The effect of such a contract, as we have seen, is, that the tenant agrees to rent the premises for one year from a given day, and to pay a specified sum, if the landlord will put certain repairs upon them by the commencement of the term, or within a reasonable period thereafter. The landlord undertakes to do this, and the contract is made. Can these covenants, *ex vi termini*, and in the very nature of things, be sought else but dependent?

[2.] In some cases, however, of mutual dependent covenants, which are conditions precedent, where several acts are to be performed, if the covenant has been in part executed, and the

Barnes vs. Strohecker and another.

plaintiff has performed a part of those acts, and for the residue a compensation can be given in action for such breach of covenant, then he may maintain an action without averring performance. *Boone vs. Eyre*, (1 H. Black. 273.)

But these are cases in which the mutual covenants go only to a part of the consideration; and it is reasonable, therefore, that the party should not be held to a strict compliance as a condition precedent. In the case last cited, for example, the plaintiff, for a certain consideration, conveyed to the defendant the equity of redemption in a plantation, together with the stock of negroes upon it, in the West Indies, and "covenanted that he had good title to the plantation, was lawfully possessed of the negroes, and that defendant should quietly enjoy." The breach assigned, was non-payment of consideration, and the plea filed was, that plaintiff had not a good title to all the negroes, and so could not convey.

It will be observed, that the breach goes to a portion of the negroes only—a part of the consideration. But as it appeared that the plaintiff had conveyed the equity of redemption to the defendant, who had gone into the enjoyment of the same, and thus the covenant was, in part, executed, it was thought to be "unreasonable that the defendant should keep the plantation, and yet refuse payment, because the plaintiff had not a good title to all the negroes." And hence, Lord Mansfield said, "Where mutual covenants go only to a part of the consideration, the defendant shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff, would be a bar to the action." See also notes to *Pordage vs. Cole*, (1 Saund. R. 320, c.)

We cannot do better than to take the case of *Hill vs. Bishop*, (2 Ala. 320,) which was also cited by the Counsel for the plaintiffs, as an illustration of the true distinction here. In that case, it was held, that "where the defendant covénants to pay a certain stipulated rent for certain premises, and is let into possession, and continues to enjoy it until the end of his term, it is no defence to an action of covenant, that the plaintiff had

Barnes *vs.* Strohecker and another.

omitted to make certain improvements and repairs to the leased premises." In that case, Judge *Goldthwait* says, "the contract of lease was executed, and it would seem absurd to conclude that the right to receive the stipulated rent could be lost by the omission of the plaintiff to insert a pane of glass, or to erect a corn-crib."

Here, again, it will be remarked, the decision is put upon the principle, that the contract had been in part performed, the consideration in part enjoyed by the tenant, and the covenant, therefore, so far as it was unperformed; (and it was on this he was relying) went only to a part of the consideration; hence, it was held just that he should be thrown upon his action for damages, and not be allowed to plead that condition which had been in part performed, as a condition precedent.

The difference, in principle, between this and the case before us, will be readily seen. The consideration here has not been, in part, enjoyed by the tenant. His moving into the house and remaining there three or four days, the repairs not having been finished, and leaving, as might reasonably be inferred, because they had not been finished, was not an enjoyment of any part of the consideration, in the eye of the law. It was, rather, evidence of the total failure of the consideration for which he had contracted to pay, viz: the occupancy, for a year, of the premises, in a specified state of repair. And therefore, it cannot be said, now, that the covenant on which he is relying for his protection, goes only to a portion of the consideration, he having enjoyed the consideration in part. But it falls within the category of mutual dependent covenants, going to the whole consideration. And in such cases, they may be pleaded as conditions precedent.

The principle is not, as the ingenuous Counsel for the executors argued, that if there were a part performance; that is, something done on the part of the plaintiffs, which had not been enjoyed by the tenant, that then the covenant could not be pleaded as a condition precedent; but it is that the defendant must have enjoyed a part of the consideration; in which case, the covenant goes only to a part of the consideration.

Barnes *vs.* Strohecker and another.

(*Comyn's Land & T.* 528. *Campbell vs. Jones*, 6 D. & E. 570.)

It was urged, that the covenants in this case, if dependent at first, and if the repairs were to be made by the executors before the commencement of the tenancy, were made independent; and consequently, the execution of the repairs, as a condition precedent, dispensed with by the acts of the tenant, (in taking possession on the 9th of October,) which amount to a waiver of the same.

We do not so regard the case made by the facts. We cannot see how such circumstances can be regarded as evidence that the tenant waived the repairs or acquiesced in their not being completed. On the contrary, it seems directly inferable, from the testimony, that he left the house because the repairs were not made. The facts, therefore, can show nothing more than that the tenant, by thus going into the house, may have waived the execution of these repairs before the 1st of October, as a condition precedent to his taking possession at that time; but they do not and cannot show, that he had waived their being completed in a reasonable time thereafter.

For the above reasons, we think the Court should have given the whole of the charge, as requested by the Counsel for the defendant, with the modification, that the Jury might look to the removal of the defendant into the house, and the associated acts; and if they believed that he thereby waived the repairs, as a condition precedent to his taking possession on the 1st of October, they might so find; but that in such case the repairs were still to be done in a reasonable time thereafter; and if they had not been done, the defendant had the right to abandon the contract, and the plaintiff could not recover.

As the charge was given, we think that the minds of the Jury were rather directed to the conclusion, that they might properly consider and determine, from the facts, whether or not the defendant had not *altogether waived* the repairs, by going into and leaving the house as he did; and if they found this to be so, they should find for the plaintiff. There was

Freeman & Benson vs. Carhart Brothers & Co.

nothing, in the evidence, which could authorize this view of the case.

[3.] The Court was right in permitting the verdict to be amended. The Jury being out in charge of the case when the Court adjourned at evening, were permitted, by the Court, to disperse when they had agreed upon their verdict; that permission being given in presence of the Counsel, who did not object. The Jury agreed upon their verdict that night, as follows: "We, the Jury, find for the plaintiff." On the next morning, when they had assembled, the Court, finding the verdict thus informal, directed the same to be amended according to the statement of the foreman, in the presence of the Jury, as to the amount which they intended to find.

Now, the fair legal intendment of the verdict, as first agreed upon, (it being a general finding for the plaintiff,) was a finding of the whole amount claimed by him. It appears, therefore, to have been simply an omission on the part of the Jury, in not at first specifying the full amount claimed. And this omission was what the Court permitted to be supplied. If there had been a material change or alteration in the verdict allowed, the case would have been different, and might have created some difficulty.

As the case goes back, it is unnecessary for us to notice the ground presented in the motion for a new trial, on account of newly discovered evidence.

Judgment reversed.

No. 62.—FREEMAN & BENSON, plaintiffs in error, vs. CARHART BROTHERS & CO. defendants.

[1.] One partner may acknowledge service of a writ, in the name of the partnership, if he does it in the presence of the other partner, and with his consent.

Freeman & Benson *vs.* Carhart Brothers & Co.

- [2.] The Constable's return on a Justice's Court warrant, may be amended after judgment.
- [3.] The Act of 1852, enlarging Justice's Court jurisdiction in the City of Macon, extends the enlarged jurisdiction to the case of joint promisors, some of whom reside in Macon and some in districts outside of Macon.

Certiorari, in Bibb Superior Court. Decision by Judge POWERS.

Carhart Bros. & Co. sued Freeman & Benson, in the Justice's Court of the City of Macon, on certain notes of Forty-five Dollars each, in different cases. Service of the summonses was acknowledged by Freeman, signing the firm name of Freeman & Benson. Benson resided out of the City District, in Vineville. Judgment was given in the cases, and *s. f. fas.* issued and levied, when defendants came into Court and moved to set aside the judgments, on the ground of the want of service, and on the further ground, that Benson resided out of the district, and that the Court had assumed jurisdiction for sums over thirty dollars; and that, especially, they had no jurisdiction for that amount, over one residing in a district where the Justice's Court has only jurisdiction for thirty dollars.

On the hearing of this rule, the Court permitted the Constable to amend his return on the summonses, by stating, that when Freeman wrote the acknowledgment of service, Benson was present and sanctioned it. The Court refused the motion to set aside the judgments, and the defendant took the case by *certiorari* to the Superior Court, which Court sustained the action of the Justice's Court; and upon this decision error is assigned.

LANIER & ANDERSON, for plaintiff in error.

STUBBS & HILL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

- [1.] A deed executed in a partnership name, by one of the

Freeman & Benson vs. Carhart Brothers & Co.

partners, in the presence of the other and with his consent, binds the partnership. (*4 Durn. & E.* 313. *Burn vs. Burn*, 3 Ves.)

If a *deed* so executed is good against the partnership, much more is an acknowledgment of the service of a writ good against a partnership, when the acknowledgment is made by one of the partners, in the presence of the other and with his consent, for such an acknowledgment need not be under seal.

This being so, the acknowledgment of service by Freeman, in the name of Freeman & Benson, bound Freeman & Benson, if Benson was present at the acknowledgment, and if he sanctioned the acknowledgment.

And that Benson was so present, sanctioning the acknowledgment, the Constable shows by the amendment which he makes to his return.

[2.] This amendment, though made after judgment, was not made too late. *Ingram & Little*, (15 Ga. R.)

The effect of the Act of 1852, was merely to make the Justice's Courts of the City of Macon larger than they had been—to make that jurisdiction which had been sufficient to include thirty dollar cases, sufficient to include fifty dollar cases.

[3:] If, therefore, before the passage of the Act, those Courts had jurisdiction of thirty dollar cases against joint promisors, some of whom resided in Macon and some in districts outside of Macon, after the passage of the Act, those Courts had jurisdiction of fifty dollar cases against such promisors.

The judgment of the Court below, therefore, ought to be affirmed.

Corry, adm'r, vs. Tompkins,

No. 63.—ROBERT CORRY, adm'r, &c. plaintiff in error, vs.
NICHOLAS TOMPKINS, defendant in error.

[1.] It is not error in the Court to refuse to repeat a charge which it has already given.

In Equity, in Heard Superior Court. Tried before Judge O. WARNER, November Term, 1854.

Nicholas Tompkins filed his bill against Robert Corry, as the administrator of William J. Germany, alleging, that in 1839 he sold and conveyed to Germany certain lands and mills for \$16,000, taking the notes of Germany and a mortgage on the premises; that about ten months thereafter, at the urgent solicitation of Germany, he re-purchased the property at \$11,000, which was to be credited on Germany's notes; and to perfect titles, the mortgage was to be foreclosed and a sale made; that complainant went immediately into possession and has remained ever since; that in 1842, Germany died and Corry was appointed administrator on his estate; that Corry, as administrator, has commenced suits for the land, which are still pending; that the proceeding to foreclose the mortgage is also pending. The bill prayed an injunction and a specific performance.

The answer denied all knowledge of the re-sale, and held the complainant to strict proof; expressed the belief of the administrator, that Germany had made large payments on the notes, amounting to at least \$6,000, and that when proper credits were given, there would not appear to be as much as \$11,000 still due to Tompkins; and prayed, that if there was a specific performance, there also might be an accounting, and a decree for Tempkins to pay to him any overplus of the \$11,000, after paying the balance due on the notes.

On the trial, evidence was introduced by complainant, to prove the re-sale as charged. There was also the evidence of one witness for defendant, that "his first understanding from

Corry, adm'r, vs. Tompkins.

the parties was, that Germany paid Tompkins \$8,000 in lands, which property he afterwards saw in the possession and control of Tompkins." Counsel of defendant requested the Court to charge the Jury, "that they must look into the payments between the parties; and if they found that Tompkins was over-paid, they must decree the amount over-paid back to defendant, before they can give complainant a decree for specific performance." Which charge the Court refused to give, and this is assigned as error.

MORGAN, for plaintiff in error.

B. H. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

In October, 1837, Nicholas Tompkins sold to Wm. J. Germany a tract of land, for the sum of \$16,000; and for the purchase money he took Germany's notes, due as follows:—\$3,000 due January 1, 1841; \$3,000, due January 1, 1842; \$3,000, due January 1, 1843, and \$4,000, due January 1, 1844, besides \$3,000, which was paid in cash. To secure the notes, he took a mortgage on the premises. In 1840, Germany re-sold the land to Tompkins, on the following terms, as stated by a witness, who took it down in writing at the time: "Tompkins was to take the land back at \$11,000, in Germany's notes; and as Germany was involved, and these executions against him, Tompkins was not to take a deed from Germany, lest the land should be made subject to the executions; but Tompkins was to foreclose the mortgage and have the land sold and bid it in, let it bring what it might. Germany was to have credit on the mortgage for \$11,000, in the notes which Tompkins held on him, for the original purchase money; that Tompkins was owing Germany, on sundry accounts, about \$1800, which was agreed to be placed as a credit on the last note due, which they called the large note, for \$4,000, because they wanted the mortgage foreclosed on the notes which

Corry, adm'r, vs. Tompkins.

fell due first, that it might be done as soon as possible; that the credit of \$11,000 was not to be entered on the notes then, but when the mortgage was foreclosed; and there was to be no interest charged either way."

Under this contract, Germany gave immediate possession, to Tompkins, of the premises. This was the testimony of Josiah Jacobs, the witness who in the suit, hereinafter mentioned, testified as to the contract. Subsequently, Germany died; no farther steps having been taken in the matter; and in 1845, Corry, his administrator, brought his action of ejectment against Tompkins and his tenants, to recover back the premises. Tompkins filed his bill in Chancery, for injunction of the ejectment suit, and for specific performance of the contract, as to the foreclosure of the mortgage, &c. The bill alleged, substantially, the foregoing facts.

The answer of Corry set up the Statute of Frauds as a defence against the contract; and asserted, there were credits to which the notes were entitled. The testimony of the complainant has been stated, with the exception of some corroborating proof as to the agreement of re-sale. The defendant offered no evidence, and the Jury decreed a specific performance for foreclosure, upon the payment, by Tompkins, to the defendant, of \$1348 61.

The complainant moved for a new trial, on the ground that the verdict was contrary to and without evidence; which motion being refused, the Solicitor for the complainant excepted and brought up the case to this Court.

There not being a scintilla of proof to warrant the verdict, a new trial was awarded. The Jury, in the face of the facts as testified to by Jacobs, computed the interest on the \$11,000 against Tompkins, from the time he went into possession of the land, in the fall of 1840, and deducted the notes of Germany, as credits or payments, as they severally fell due; and setting off one against the other, struck the balance; whereas, in truth, according to the evidence, there should have been a decree for Tompkins.

Corry, adm'r, vs. Tompkins.

Germany was still owing Tompkins the three first instalments for the land, of \$3,000 each, making \$9,000, and \$2,200 on the last or large note, as the parties called it, viz: \$4,000, with a credit of \$1800, making the whole amount of Germany's indebtedness to Tompkins, \$11,200. From this sum deduct the \$11,000 owing by Tompkins to Germany, on the re-purchase of the land, and it leaves a balance, in favor of Tompkins, of \$200.

Consequently, this Court determined to send the case back, remarking, when it was before up, that "on the re-hearing, it would be competent for the defendant to offer proof of payments by his intestate, provided any were made. If this should be done, and the mortgage debt be found to be *over-paid*, Tompkins must discharge the amount before he would be entitled to a decree for the re-conveyance of the land."

Upon the last trial, the depositions of William Wilson were taken and read to the Jury, and was the only additional testimony which was not offered on the first trial. He swore, that he understood, from Germany and Tompkins, that Tompkins sold Germany his grist and saw-mill, together with six lots of land, for \$16,000; that it was in the fall of 1839 or 1840; and witnessess's first understanding from the parties was, that Germany paid Tompkins \$18,000, consisting of land, which property he afterwards saw in the possession or under the control of Tompkins."

The cause being closed, after argument, the Court charged the Jury, amongst other things, that they must be satisfied, from the evidence, of the existence of the mortgage and notes upon which it purported to be founded, at the time of the execution of the contract sought to be performed; and that the amount of indebtedness appearing upon the notes, was unpaid at the time of the agreement set up, and prayed to be enforced."

Counsel for defendant requested the Court to charge, that before a decree for specific performance could be rendered, the Jury must look into the payments between the parties, and if they found that Germany had overpaid Tompkins, they must

Certy, adm'r vs. Tompkins.

decree the excess to Corry before the complainant was entitled to the relief which he asked."

This request the Court refused to charge, and Counsel for the defendant excepted.

Why Judge WARNER refused to give the charge as requested, does not appear. We apprehend it was for the reason, that he had already instructed the Jury, in substance, to the same effect. And in fact, the charge given was broader than that which was requested. It was, that unless the Jury found that there was at least \$11,000 due and unpaid, in the Germany notes, at the time of the second contract, no decree of foreclosure could be rendered: whereas, by the charge, as asked, if the Jury found that the mortgage debt was overpaid by discharging the excess, the complainant would be entitled to a decree for specific performance. One thing is indisputable—the charge, as given, covered the issue—debarred the defendant of no right—shut out no testimony. It left the question of payment, as sworn to by the witness, Wilson, fully open to the consideration of the Jury. And if, after weighing it, the Jury had found that Germany did not owe Tompkins \$11,000 upon the mortgage, a verdict for the defendant was inevitable.

The truth is, the Jury must have concluded that Mr. Wilson was mistaken. And it is not strange that they did. All the proof goes to show, that in addition to the lots of land of unascertained value, conveyed by Germany to Tompkins, \$16,000 was the purchase money agreed to be paid for the land. That \$3,000 was paid at the time, leaving a balance of \$13,000 still due, for which the four notes of Germany were taken, that is, three for \$3,000 each and one for \$4,000. Would this have been done, if, instead of \$3,000, as proven by Jacobs, \$8,000 had been paid, as testified to by Wilson? The facts and figures are irreconcilable with this hypothesis, to say nothing of the unlikelihood that Tompkins should, at the time of the re-sale, have retained the notes of Germany, when these notes had been overpaid. That he should have kept possession of these notes, to the amount of \$11,000, notwithstanding he owed Germany that sum, is natural enough; for it was the

Tompkins vs. The State.

agreement that this should be done for the purposes of the foreclosure, to perfect the title. That he should have held them with a small balance in his favor, after setting off the \$11,000 due by him, is nothing improbable. But that he should have kept them open for five thousand dollars more than was due, and which should have been deducted from the price of the land at the date of the first sale, would require the strongest proof to carry conviction to the Jury, in the face of the facts before them.

No. 64.—NICHOLAS TOMPKINS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] If two or more embark in a common enterprise; the acts and declarations of each of the confederates, made or done in pursuance of the preconcerted agreement or understanding, are evidence against the other; and whenever enough of evidence is given in, as will conduce to prove a *prima facie* case of concurrent or joint action, the whole transaction should be submitted to the Jury.
- [2.] It is competent to prove that a party has assigned a false reason for his conduct, as it serves to convict him of the true one.
- [3.] Where two assaults and batteries are committed on the same day, within a short period of each other, it is competent for the Solicitor General, under the same indictment, to try the defendant for either: but he cannot submit both to the Jury at the same time; especially, if no proof has been offered as to the *second*, except only for a limited purpose, and not to establish, fully, the guilt or innocence of the accused.
- [4.] If the Solicitor fail to support the one by proof, can he abandon that and proceed to try the defendant for the other? *Quere.*

Assault and battery, in Heard Superior Court. Tried before Judge O. WARNER, November Term, 1854.

Nicholas Tompkins was placed upon his trial for an assault

Tompkins vs. The State.

and battery upon one William F. Crockett. It appeared that Tompkins and some others left Franklin one afternoon about dusk, and near the bridge, on Tompkins' road to his home, a wagon overtook him with Crockett—Phillips and McDaniel in it. A quarrel ensued—(about which the evidence was very contradictory)—Crockett jumped out of the wagon and advanced towards Tompkins, who struck him with a stick: McDaniel then threw a rock at Tompkins. The matter was quieted, and they started on. Counsel for Tompkins proposed to prove, that McDaniel jumped out of the wagon to help Tompkins; that one of the crowd in the wagon was seen to pick up rocks and put them in his pocket, before the wagon started from town; and that one Foster James, a brother-in-law of Crockett, threw rocks at Tompkins just before the wagon overtook him, and that James then went up and urged on the difficulty; all of which was offered to prove a *conspiracy* to mob Tompkins. The Court rejected the evidence, unless notice of the conspiracy was brought home to Tompkins. To which decision Tompkins excepted.

Crockett, when examined, stated that he was a Justice of the Peace and was going, that evening, to prepare a *certiorari* bond for one James F. Bevis. Bevis was offered as a witness, to prove that Crockett saw him at the Cross Roads that evening, and said nothing about a *certiorari* bond, &c. The Court rejected the evidence and Tompkins excepted.

Crockett also stated, on examination, that he had no desire for a difficulty, and desired peace. It was proven that he said the same thing after the battery. The Court admitted evidence, to show that he afterwards, on the same evening, threw other rocks at Tompkins, after the party reached the Cross Roads, for the sole purpose of disproving his professions of peace. This evidence showed another rencontre at the Cross Roads. The Solicitor, in his argument, relied on this second rencontre, to convict for a battery. Counsel for Tompkins objected, as the evidence was admitted for a different purpose, solely. The Court charged the Jury, that they might consider this evidence and find him guilty, on that alone. To this

Tompkins *vs.* The State.

charge, Tompkins excepted. A motion was made for a new trial, on all these grounds, and also because the verdict was contrary to the weight of evidence. The Court refused this motion, and Tompkins excepted. On these exceptions, error is assigned.

B. H. HILL, for plaintiff in error.

SOL. GEN. BLAKELY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first exception in this case, applies to a considerable portion of the exculpatory testimony relied on by Tompkins. The Circuit Judge ruled out as evidence, all the acts and declarations of every other person implicated with Crockett in the alleged conspiracy to mob Tompkins, unless notice thereof was brought home to the defendant.

The assault and battery is not denied. Tompkins pleads that he was justified in striking Crockett. There is some conflict of testimony as to what transpired when the rencontre took place; and the doubt consequently is, who was culpable for forcing the fight? Now if it could have been shown that there was a preconcerted plan—a common enterprize set on foot by Crockett and his crowd, to beat Tompkins, is not the proof admissible, as calculated to reflect light on the conduct of Crockett, when he overtook Tompkins?

But a portion of the proof connects itself still closer with the transaction. When Crockett dismounted from the wagon, McDaniel, who was riding with him, jumped out also and pulled off his coat; and Phillips, another one of the associates, held the reins of the horse. Do not these demonstrations, connected with the previous purpose, make McDaniel and Phillips parties to the combat? Were they not actually present, aiding and abetting? And may we not—nay, must we not, suppose that Tompkins acted in the light of these surrounding circumstances, indicating the peril which beset him?

Tompkins vs. The State.

We admit that the competency of the testimony depends upon the fact of a concert and communication between the parties. If they embarked in a common enterprise, and they acted together in pursuance of this preconcerted agreement or understanding, Crockett is not only answerable for the acts of his confederates, but their acts and declarations are admissible, as a part of the *res gestæ*. The whole conduct, acts and declarations of the one are evidence against any one of the others. Crockett seeks the protection of the law for an injury inflicted on his person by Tompkins. If he and several others united to pursue Tompkins for the purpose of whipping him, and thus brought about the difficulty, the prosecutor comes with a poor grace to claim the vengeance of the law upon the head of his successful foe. The law was made to shield those from insult and abuse, who live in the peace of God and of the State, and not as an immunity to bullies and bravadoes.

It is not for us to decide, neither was it for the Court below, how far the connection between Crockett and the other parties is proved. This could only be done by their acts and declarations made in the presence of Crockett and in furtherance of the scheme which they had on foot. There was enough offered to make out such a *prima facie* case of concert and joint action as to make it proper to submit the whole to the Jury.

The general rule is this: in cases of crime perpetrated by several persons, when once the combination is established, the act or declaration of one accomplice in the prosecution of the enterprise, is considered the act of all, and is evidence against all. (*Arch. Crim. Law, 6th Ed. note, by Waterman, p. 125-3.*)

[2.] As to the testimony of Bevis, which was rejected, it went to show that Crockett assigned a false reason for going to the Cross Roads. He pretended that he was going there to fix up a *certiorari*; that being untrue, the Jury were left to infer that he thus went out of his way to seek an interview with Tompkins. Cromwell, to justify the murder of his Monarch, pretended that his tongue clave to the roof of his mouth

Tompkins vs. The State.

while praying for his safety and deliverance. A girl, who gives as a reason why she is not in love, that her beau is no older than herself; is already a victim to the tender passion. So it has been with men and women, too, in all ages of the world.

[3.] The next point in this case is this: Counsel for the defendant, by leave of the Court, had propounded some questions as to what transpired at the Cross Roads, but confessedly for the purpose of discrediting Crockett, and for none other. And the examination was sanctioned by the Court, for this single object. The Solicitor General, at the commencement of his argument, announced his intention to ask a conviction of the defendant for the battery which occurred at the grocery at the top of the hill. He was asked by the Court if he could produce authority to authorize such a practice, and the case of *Wingard and Ham vs. The State*, (13 Ga. Rep. 396) was cited in support of it. The discussion proceeded. His Honor, in the meantime, examining the case. Toward the close of the case, the Judge held that it was competent to convict Tompkins for the last assault.

Did *Wingard and Ham vs. The State*, sanction this proceeding? Two propositions were embraced in that decision. First. That playing and betting with cards, at any one of the games designated in the 11th section of the 10th division of the Penal Code, will constitute an offence; and that for every such game, unconnected with the other, an indictment will lie; yet, when all are perpetrated by the same person at the same time, they constitute but one offence. And Secondly. That the proof of guilt was not confined to the day mentioned in the indictment; but may extend to any period previous to the finding of the bill and within the statutory limit for prosecuting the offence.

[4.] Were these batteries one in law, and could they be so treated? no more so than if one of them had been made in the morning and the other in the evening. And upon the other ground, the State having elected to try the defendant for the first assault, could not convict him of another; and that, too, not only without abandoning the first, but what is infinitely more objectionable, without the defendants having been tried

Wood and another *vs.* McGuire's Children.

for the second. Had the prisoner been notified, before the proof closed, that the first assault was abandoned, and that the Jury would be called upon to give a verdict for the second, other testimony might and probably would have been adduced to that. How stands the matter then? The Jury may have thought Tompkins not guilty in the first case, the only offence for which he was tried, and convicted him of another, for which he was not tried!

This judgment, we are clear, cannot be sustained.

As a new trial will be awarded, we forbear to express any opinion upon the evidence.

No. 65.—WILLIS WOOD and another, plaintiffs in error, *vs.*
MILLY MCGUIRE'S CHILDREN, defendants.

- [1.] The verdict must comprehend the whole issue or issues submitted to the Jury.
- [2.] Every reasonable construction is to be adopted in favor of the verdict.
- [3.] Where the Jury express their meaning in an informal manner; yet, if the point in issue can be concluded from the finding of the Jury, the Court will work the verdict into form and make it serve.
- [4.] Informal verdicts may be amended, but the Court has no power to supply substantial omissions.
- [5.] In an action of ejectment, under *Jones' Forms*, the verdict ought to find the issue either for or against all the plaintiffs.

Ejectment, in Bibb Superior Court. Decision by Judge HARDEMAN.

This was an action for land, brought by Lovick N. McGuire, George M. McDonald, in right of his wife, Ora F. McDonald,
see. xvii-48

Wood and another vs. McGuire's Children.

Mary Elizabeth McGuire, Daniel J. McGuire and Jemima K. McGuire, the children of Milly McGuire, against Willis Wood and William Johnston.

The Jury returned the following verdict: "We, the Jury, find in favor of the plaintiffs, Mary Elizabeth McGuire, Geo. M. McDonald, in right of his wife, Ora F. McDonald, Jemima K. McGuire, Daniel J. McGuire, to the undivided four fifths of the premises in dispute, and two hundred and fifty dollars, with costs of suit.

The defendants moved to set aside this verdict, on the ground, that it did not decide the issue as to one of the plaintiffs, to-wit: Lovick N. McGuire, which motion, on argument, was over-ruled by the Court; and this decision is assigned as error.

STUBBS & HILL, for plaintiffs in error.

LANIER & ANDERSON; POE, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Lovick McGuire was a party plaintiff in the suit. It was admitted, and the proof showed that he had conveyed his interest to the defendants. The Court charged the Jury, that they were bound to find against him. They were certainly bound to find, either *for* or *against* him. And failing to do either, the verdict and judgment are imperfect, and should have been vacated.

[1.] The general rule undoubtedly is, that the verdict must comprehend the whole issue or issues submitted to the Jury in the particular cause; otherwise, the judgment founded on it should be reversed. (1 Arch. Pr. 190. Patterson vs. The United States. 2 Wheat. 225. Miller vs. Tretts, 1 Ld. Raym. 324.)

In *Holmes vs. Wood*, (6 Mass. R. 1,) the Supreme Court of Massachusetts held, that if the issue joined be material, the

Wood and another vs. McGuire's Children.

verdict ought to find the issue either for or against the party tendering it.

[2.] Indeed, the Circuit Judge recognized the rule, but was of the opinion, that the point in issue could be concluded from the finding of the Jury in this case; that the Court could work the verdict into form and make it serve. If this could be done the verdict should stand; and every reasonable construction should be adopted for this purpose. (2 *Burrow*, 693. 14 *Johns.* 84. 1 *Root*, 321.)

[3.] In *Kerr vs. Hartshorne*, (4 *Yeates*, 293,) Chief Justice *Tilghman*, very properly limits the authority of the Court to cases where the Jury have expressed their meaning in an informal manner, and says the Court has no power to supply substantial omissions.

[4.] But the difficulty here is, not that the Jury have expressed their meaning in an informal manner, but they have failed to express any opinion at all as to one of the parties. True, they have not found *for* Lovick McGuire; but are we authorized to say, that they intended to find *against* him? How shall the verdict be amended then? For this plaintiff or for the defendants, as to him? The verdict gives no response to this question; and the Court is not at liberty to answer for the Jury. *Petrie vs. Hannay*, 3 *D. & E.* 659, and *Richardson vs. Mellish*, 3 *Bingham*, 334, are authorities for amending informal verdicts. But here there is nothing whereby an amendment can be made.

[5.] Under *Jones' Forms*, under which this complaint was filed, it may become important that even in ejectments the verdict and judgment should be commensurate with the issue. But as already stated, they should be so in *all* cases, independent of the Act of 1847.

Walker, ex'r, vs. Hunter et al.

No. 66.—CHARLES WALKER, executor, plaintiff in error, vs.
WILLIAM HUNTER, et al. defendants.

- [1.] If it is the rule of the Ecclesiastical Courts of England, that the evidence of as many as two witnesses is necessary to prove the execution of a will, be the circumstances what they may, it is not the rule of any of the Courts of this State.
- [2.] Although a person has a right, and it is lawful for him to move a testator, to make him his executor or give his goods even, when the testator is a person of weak judgment and easy to be persuaded, and the legacy great; yet, if, in such a case, a person does so move a testator, a very strong presumption arises, that the "moving" is of a sort not right or lawful—a presumption only to be rebutted, by that person's bringing forward something sufficient to show the will such as a man of average mind, morals and family love, might be supposed willing to make.
- [3.] Whilst a case is on trial, a Counsel for the party that prevails, entertains, for a night, two of the Jury and the prevailing party: *Held*, that this is a sufficient ground for a new trial.
- [4.] If a paper, calculated to influence a Jury in favor of one of the parties, gets improperly before them while considering of their verdict, and they find for that party, it is a ground for a new trial.

Caveat, from Twiggs Superior Court. Tried before Judge POWERS, March Term, 1854.

This was a caveat to the last will and testament of William Hunter, Sr., filed by the defendants in error, on the following grounds:

1st. That the testator, William Hunter, at the time he made and published said will, was not of testable capacity, but was of weak and unsound mind.

2nd. That the said testator, at the time he made and published his said last will and testament, was laboring under a mental delusion in regard to the slaves or negroes bequeathed by him in said will; that he fancied, and delusively believed, that their being separated and scattered after his death, might be prevented by bequeathing them all to one person; and that under such mental delusion, he made and published his last will and testament.

3d. That the said testator was unduly and improperly influenced to make the said last will and testament, by the said Charles Walker, one of the executors thereof, and in favor of whose son, or sons, not being of the blood or akin to the said testator, an estate in remainder of all the negroes and their increase was bequeathed.

4th. That the said Charles Walker, the executor of the said last will and testament of the said Wm. Hunter, deceased, procured the said William Hunter by his fraud, covin, and by his wicked and fraudulent contrivances and machinations to make the said will and testament, and that the same is void—

For that the said Charles Walker, executor, as aforesaid, induced the said William Hunter to leave his residence in the County of Twiggs, and go (to) the residence of himself, or that of one of his brothers, in the County of Pulaski, where the said will was executed.

That the said will is headed, "Georgia, Twiggs County," where the residence of the said William Hunter was, and executed in the County of Pulaski, where the said Charles Walker resided.

That two of the witnesses to the last will and testament were the brothers of the said Charles Walker, one of the executors thereof, and uncles of one of the legatees in remainder, and the other an employee or workman employed at the time, by the said Charles, or one of his brothers.

That the said Charles Walker, executor aforesaid, procured the draft of said will to be made by an Attorney at Law—but by what Attorney at Law is unknown to this caveator—and to be copied off by some other person—but by whom is unknown to this caveator.

That said last will and testament was not drawn by the instructions of the said testator, but by the instructions of the said Charles Walker.

That by the said will, an estate in remainder, of all the negroes of the said William Hunter, deceased, was bequeathed to one of the sons of the said Charles Walker, and in the event of his death before the death of Charles Hunter, the person to

Walker, ex'r, vs. Hunter et al.

whom a life estate in the same negroes was bequeathed, then the said negroes were bequeathed to David Walker, another son of the said Charles Walker, executor.

That the said Charles Walker, nor his son or sons, are or were of blood-kin to the said testator.

That the said William left several brothers and sisters, nieces and nephews, his heirs at law, having departed this life without leaving a widow or child, or descendant of child; that all were excluded from the provisions of the will, except Charles Hunter, although they were friendly and on good terms with the said testator; that to the said Charles Hunter the said William Hunter bequeathed and devised the whole of his estate, real and personal, except his negroes, and a life estate in them.

That the said Charles Hunter was a man of weak mind, easily controlled and much under the influence of the said Charles Walker, the executor as aforesaid, and actually, in a few months after the death of the said William Hunter, deceased, executed to the said Charles Walker, the said executor, a deed of gift of all his lands, acquired under and by virtue of said will: and also of all the stock and their increase, and his plantation tools—all of great value, to-wit: of the value of twenty thousand dollars, or other large sum; and subsequently executed a will, by which, in a state of great mental weakness and unsoundness, and while of intestable capacity, as this caveator believes and alleges, he bequeathed to the said Charles Walker, all his money and debts not previously conveyed to him in the deed of gift: that he made no return of an inventory or appraisement of the estate of the said William Hunter: that he alone, as executor of said William Hunter, at first qualified as executor and took out letters testamentary.

The following is the bill of exceptions, which will show the facts of the case:

GEORGIA—TWIGGS COUNTY:

Be it remembered, that at the March Term, 1854, of Twiggs Superior Court, the above stated cause came on to be tried, on

Walker, ex'r, vs. Hunter et al.

appeal, before the Hon. A. P. POWERS, Judge, and a special Jury, when Counsel for propounder moved to strike out the second ground of caveat and so much of the fourth as brought in question the capacity of Charles Hunter, which motion was over-ruled by the Court, and propounder excepted.

EVIDENCE.

David Walker was sworn, and testified that the paper handed him was the will of William Hunter. He, the witness, subscribed it as a witness the day it bears date, 16th Nov. 1839. Thomas D. Walker and Richard W. Lee subscribed the will at the same time as witnesses with him, the witness, and that this is the paper they witnessed. Thomas D. Walker is dead, and has been for eight or ten years. Does not know where Lee is. He is not in Georgia within witness' knowledge. He has inquired for him and cannot hear of him, and does not know where he is, nor which way he went. Has been gone six or seven years. He, witness, saw testator, William Hunter, sign the will in presence of the witnesses, and the witnesses signed it in the presence of the testator, Hunter, and of each other. Witness signed it at the request of William Hunter; signed the paper as his will, in the presence of the witnesses, and they all signed in presence of each other. William Hunter came to witness' house at front gate and asked him to go with him to Charles Walker's, and he went with him; and on the the way to Charles Walker's, Hunter told witness he was going down to make his will, and wanted him to witness it. Witness, David Walker, lives not over a half a mile from Charles Walker's, and between William Hunter's and Charles Walker's. Wm. Hunter lived about six miles above witness. The paper, the will shown witness, is the paper Hunter asked witness to sign. He saw Thomas D. Walker and Richard W. Lee sign it. Their signatures are genuine. As far as witness knew, William Hunter was of sound mind. He thought him, at the time, capable of transacting business. Had been acquainted with him fifteen or twenty years. When witness first became ac-

Walker, ex'r, vs. Hunter *et al.*

quainted with him he lived about ten miles from him. Afterwards moved to within six miles. Had had a good deal of intimacy with him. William Hunter came to witness' house on the day testified about, on horseback. He discovered no difference in his mind on that day (the day the will was executed) from what it was before. Appeared to be in good health, and was not sick. Hunter had a good deal of property, lands; negroes, horses and mules. He had a good many negroes, and managed all his own business. He lived several years after the date of the will, and is said to have died in his seventy-fourth year. William Hunter, after he got to Charles Walker's, observed to witness, "I want you all to sign it," (the will.) No one was with Hunter when he called at witness' house. He wanted witness to go with him and he went. He did not then say what he wanted. Thomas D. Walker lived about three quarters of a mile from Charles Walker's. Lee was there when witness and Hunter got there. Thomas D. Walker got there about the time witness got there. He lived below Charles Walker's. Dr. Taylor was there when witness got there. It was not half an hour after witness got there before the will was signed. The first he saw of the will Mr. Hunter had it in his hand, and he laid it on the table. No one had time to write the will after witness got there. Witness does not suppose the will is in the testator's hand-writing. Testator did not tell witness, as he went to Charles Walker's, whether he had the will written or not, nor did he show the will to witness. Charles Walker, Thomas D. Walker and witness, are brothers. William Hunter lived from three fourths to a mile from Tarversville, a public place. William Hunter invited witness from the parlor into the room where the will was executed. Charles Walker was in the room. He does not recollect that Hunter had been sick, and staying at Charles Walker's before the will was made. There was a report that testator once attempted to hang himself. It was, he thinks, some time before the date of the will; but never heard they had to set up with him and watch him to prevent his hanging himself. Nor does he recollect that testator had, ~~about~~ that

Walker, ex'r, vs. Hunter et al.

time, been at Charles Walker's. Cannot say that Charles Walker had attended to business for testator. Charles Walker might have shipped his cotton. The testator did not have much company about his house, but was frequently at Tarversville. He lived secluded and had but little to do with the world. Witness did not know testator before he had much property. Charles Walker visited testator in company and alone. Does not know how often. He and his family visited Hunter as relatives usually do. Testator was a good farmer, and as far as witness knows, a man of strong mind, and very determined. Witness does not know how long after the date of the will it was that Lee left. Lee usually made Thomas D. Walker's his home while he was in the neighborhood. The will was not read in witness' presence. The testator took it when signed, and witness next saw it in the Ordinary. Witness does not know who produced the will before the Court of Ordinary, but supposes Charles Walker, the executor, when first produced for probate; nor does he know where it came from. He believes testator had mind enough to remember the names of his negroes. He heard it spoken of how the property was given, but never heard the will read to this day (the day of testifying). Charles Walker's oldest son is seventeen or eighteen years old, now. Witness don't remember how many children Charles Walker had at that time, but thinks three or four. At the time the will was made, Charles Hunter had no property except a horse and some money. Charles Hunter lived with William Hunter, (his brother,) and after his death he lived a short time at William Hunter's plantation, and then went to Charles Walker's, and died there. The mother of William Hunter lived and died at Thomas Hunter's (her son,) as Thomas Hunter told witness. After Charles Hunter got to Charles Walker's, he, Walker, had a room built for him. Charles Hunter rather opposed the building the room.

To all this testimony touching Charles Hunter and his property, and the sayings of Thomas Hunter, the Counsel of pro-

Walker, ex'r, vs. Hunter et al.

pounder objected, but their objections were over-ruled and they excepted.

The witness further testified—William Hunter was a widower. Charles Walker's first wife was the grand-daughter of William Hunter's dead wife. William Jemerson Walker is dead, and if alive would now be twenty or twenty-one years old. David Walker is the son of Charles Walker's first wife, and who was a Jemerson. Witness does not know from whom William Hunter derived his property. He does not know when Mrs. Hunter died. Charles Walker is now in possession of the lands devised by William Hunter to Charles Hunter.

This was objected to by Counsel for propounder, but admitted by the Court, and they excepted.

The will of William Hunter was then read in evidence, and which is, by copy, as follows:

GEORGIA, TWIGGS COUNTY:

Exercising the privilege which is conferred upon me by the laws of my country, of disposing of my property whilst in life, by a will to take effect upon my death, I do hereby declare this instrument as my last will and testament, as follows:

First. I desire that my just debts shall be paid.

Second. I give and bequeath unto my brother, Charles Hunter, for the natural love and affection I cherish for him, all my lands, money and stock of horses, cattle, hogs, and all other chattels, personal, whatsoever, subject to the exception herein-after mentioned, and the remainder or limitation thereof.

Third. My negroes and their increase I give and bequeath to my brother Charles, during his natural life, or a life-time estate therein; and upon the death of my said brother, I then give and bequeath my negroes and their increase, absolutely, unto William Jemerson, first son of my friend Charles Walker of Pulaski County, for the friendship and good will I bear to said Charles and his son, William Jemerson. And should William Jemerson die before my brother, Charles Hunter, I then give and bequeath my negroes and their increase unto David, the second son of my friend, Charles Walker, absolutely.

Walker, ex'r, &c. Hunter et al.

Lastly. I appoint my brother, Charles Hunter, and my friend, Charles Walker, my executors, with ample authority and discretion to carry out the intention of my will.

Signed and sealed by the testator in our presence, and in the presence of each other, at the request of the testator, this the sixteenth of November, in the year of our Lord, One Thousand Eight Hundred and Thirty-nine.

WILLIAM HUNTER, [L. S.]

Test—

DAVID WALKER,
THOMAS D. WALKER,
RICHARD W. LEE.

The propounder having closed, the caveator offered in evidence what purported to be a will of Charles Hunter, after proving by Lewis Solomon that it was the original, from his office of Ordinary, and was proven in common form by Charles Walker, the executor, who took out letters testamentary.

GEORGIA, TWIGGS COUNTY:

In the name of God, Amen. I, Charles Hunter, of said State and County, being of advanced age, and knowing I must shortly depart from this world, deem it right and proper that I should make a disposition of the property with which a kind Providence has blessed me—I therefore make this my last will and testament.

1st. I desire and direct that my body be buried in a decent and Christianlike manner, by the side of my brother, William Hunter.

2d. I desire all my just debts be paid by my executor without delay.

3d. I give and devise to my much esteemed friend, Charles Walker, St. of Pulaski County, all money that I may have at my death, either in notes or bank checks, or whatever I may die possessed of, that I have not heretofore deeded away.

4th. I constitute and appoint my worthy friend, Charles

Walker, ex'r, vs. Huiter et al.

Walker, Sr. of Pulaski County, executor of this my last will and testament, this April 29th, 1851.

CHARLES HUNTER, [L. S.]

Signed, sealed, delivered and published by Charles Hunter as his last will and testament, in the presence of us, the subscribers, who subscribed our names hereto in the presence of said testator and of each other, this 29th April, 1851.

CHARLES E. TAYLOR,

WILLIAM MARTIN FRASER,

SETH S. MELLON.

Which will was objected to as incompetent and irrelevant evidence, by Counsel for propounder of Wm. Hunter's will, and objection over-ruled, and they excepted.

The caveators then offered in evidence a deed from Charles Hunter to Charles Walker, which propounder's Counsel objected to as incompetent and irrelevant, but objection over-ruled, and they excepted, and the deed was read as follows:

GEORGIA, TWIGES COUNTY:

This Indenture witnesseth, that for and in consideration of the friendship and kind feeling which I bear for Charles Walker, of the County of Pulaski, and for the valuable consideration of the sum of one hundred dollars, in hand paid me, the receipt whereof is hereby acknowledged, I, Charles Hunter, of the State and county aforesaid, do bargain, sell, and convey unto said Walker, all that body or parcel of land amounting to twelve hundred acres, more or less, on which I now reside, adjoining Tarver's, Shine and others, and to his heirs, to have and to hold the same to their own proper use, benefit and behoof, forever. As also, I bargain, sell and convey unto Charles Walker, all my stock of every description, of horses, mules, cattle, hogs, &c. as also all plows, gear, tools, and every other article or thing belonging to the plantation, necessary to the proper cultivation or repair or keeping up of the same. This deed of conveyance to be subject to this condition: that the said Charles Hunter is to continue in the

Walker, ex'r, vs. Hunter et al.

unrestricted use, control and enjoyment of all the property herein conveyed, for and during his natural life, without rent or accountability for such use. And should any of the personal property or chattels now and hereby conveyed, be exchanged for other property, that so exchanged for is to be treated and held as property now conveyed; and the increase of the stock of every kind, as also of other chattels, however caused, is to be treated and considered as a part of this conveyance, and secured to the said Charles Walker thereby.

In testimony whereof, I have hereto set my hand and seal,
this 27th October, 1847.

CHARLES HUNTER, [L. S.]

In presence of

DANIEL H. COOMBS,

IVERSON L. HARRIS,

ISQUAL RAINY, J. P.

Caveators then offered the depositions of Samuel Jemerson, to which Counsel for propounder objected as incompetent, so far as they related to the saying of Mrs. Hunter, and touching the report of a former will, and an agreement, verbal, between Hunter and his wife. Objection over-ruled, and Counsel excepted.

Samuel Jemerson: Witness knew William Hunter, of Twiggs County, Georgia. He married his mother, then Mrs. the widow Jemerson; but he knows nothing of any agreement between said Hunter and his said wife, prior to their marriage, respecting their property, or the division of the same. He once had a conversation with his mother, then the wife of Hunter, in which she informed him that her husband had made a will, and had given one half of his property to his people and the other half to her people. That some seven or eight years after the death of his mother, he communicated to Wm. Hunter what his mother had told him, and asked him if he had made such a will; and he answered that he had, but that since the death of his wife he had burnt it. Said will was written,

Walker, ex'r, vs. Hunter et al.

as well as he now recollects, by Wm. Dowsing of Lincoln County. In the conversation with W. Hunter, above referred to, he asked him what objection he had to carrying out the agreement or understanding between him and witness' mother in relation to the disposition of their property as aforesaid; and said Hunter then replied, that it was terrifying to him to have his negroes scattered all over the world. Witness then asked him how he could prevent that after his death; and Hunter told him he thought he had fixed that; that he had given the negroes to Charles Walker's child, and that by the time that child would die, the negroes would die with old age. He once had a conversation with Charles Walker, and immediately after with William Hunter above stated, in regard to said Hunter, several years before having been deranged in his mind, and said Walker told witness that at the time said Hunter was so deranged in mind, he, Walker, went to Hunter's house and persuaded him to go home with him, which Hunter did; and that in about three days he cured him (Hunter). Witness then asked Walker how he did it; and Walker laughed and said he did it by talking to him. Walker further stated to witness, that while Hunter was so deranged in mind, Charles Hunter, brother of William Hunter, sat up and watched him (Wm. Hunter) three days and nights, to keep him from hanging himself. This conversation, above detailed, with William Hunter and Charles Walker, occurred in October or November, 1839. He is not interested in the case. William Hunter was married to his mother in the month of August, 1802, but does not know when the will was made, about which he and Hunter had the conversation before stated. He has stated all the conversation between him and William Hunter about fixing his property, and that conversation occurred in October or November, 1839, at the house of William Hunter, in Twiggs County, Georgia. No person was present except Hunter and witness, and the reason he gave for fixing his property so was, that it was terrifying to him to have his negroes scattered all over the world. Witness does not know that the will in dispute is the same that was alluded to. In the conversation,

Walker, ex'r, vs. Hunter et al.

which he had with William Hunter, he endeavored to get him to carry out the agreement between him and witness' mother, as he understood it, and that he did that by the request of his mother. Mrs. Hunter was the widow of Jemerson before marriage. Charles Walker's first wife was her grand-daughter, and was Margaret Jemerson before she married Walker. She is now dead: but when she died he cannot state. He tried to get Charles Walker to influence William Hunter to carry out the agreement which witness' mother had informed him was, existing between her and her husband; but he refused to do it. He once wrote to Stark Hunter that William Hunter, his brother, was dead; that it was understood that he had given his negro property to Charles Walker's oldest son; and that if he was in his place he would commence suit for it. He wrote to said Hunter on the 4th February, 1847; he cannot state when nor where the verbal agreement between William Hunter and his mother was made, and of which he has spoken. He last saw Hunter at his own house, in Twiggs County, Georgia, in October or November, 1839. Said Hunter was then, judging from his conversation, a man of ordinary capacity, and capable of attending to his business as men generally do. William Hunter, when he married his mother, had no property except an old white horse. He did not know that Hunter was going to marry until the day before it took place. There is no private agreement between him and the heirs of William Hunter, or their Attorneys in relation to this suit. He never wrote but two or three letters upon the subject, and they were to Stark Hunter, and perhaps one other letter to Seth Hunter. Sworn to and executed in Alabama.

The depositions of Humphrey Jefferson were offered and objected to as the sayings of Charles Walker, long before he was executor, and also, witness' understanding. Objection overruled and deposition read, and Counsel for propounder excepted.

Humphrey Jefferson: Witness knew William Hunter prior to his death, as far back as he can remember. He heard Walker say something tending to show his opinion of the in-

Walker, ex'r, vs. Hunter et al.

fluence one might acquire over the said Hunter. The last time he saw William Hunter was at his, Hunter's house, but does not recollect the time. Hunter's wife was witness' grandmother, and he has always understood he got his property by her. Witness had a conversation with Charles Walker some three or four years before he (witness) removed from Georgia, and during the year witness lived with Hunter; but does not recollect the year nor place, nor whether any one was present or not. This gave rise to the conversation. Witness had determined to leave William Hunter, with whom he was living. He met Charles Walker, who accosted him thus: "I suppose you are going to quit old Billy?"—when witness replied in the affirmative. Walker said he was a fool—that he ought to stay with said Hunter and nurse him—that he could influence him to give him, witness, all his property. This is the substance of the conversation alluded to. He does not know what kind of influence. Witness does not know the state of Hunter's mind when he made his will. This is all he knows.

Sworn to and executed in Alabama.

The depositions of Artimethia Wheat were offered and objected to as hearsay from Mrs. Hunter and others, and about another will not in controversy, and because some of the cross questions were not answered, but reference was made to her answers to direct interrogatories for answers to the cross. Objection over-ruled, and Counsel for propounder excepted.

She knew William Hunter, and I knew of his making a will, written by William Dowsing, Sr. in which he willed his property to his wife during her life-time; and at her death, the property was to be divided—one half to go to her children and the other half to his relatives. This will was made in Lincoln County, Georgia. Does not know what has become of it. It was left in the hands of William Dowsing, Esq. Witness' mother made an effort, through Mr. Wheat, her son-in-law, soon after the death of Dowsing, to get possession of said will; but was informed, said will could not be found amongst Esquire Dowsing's papers. She never heard Charles Walker say anything about William Hunter's will. Witness knows, that one

Walker, ex'r, vs. Hunter et al.

visit to William Hunter's, soon after the death of her mother, (Mrs. Hunter) the said Hunter appeared to have lost his mind to a considerable extent. She visited Twiggs County again in 1841, some ten years after the death of her mother, and called on the said William Hunter—that his mind appeared much impaired—so much so that he was incapable of doing business correctly; and that he was all the time more or less intoxicated. She was present when William Hunter made a will (the Dowsing will)—that said will was made between the years 1805 and 1808, in Lincoln County, Ga. and was witnessed and sealed, but does not recollect who witnessed it. Dowsing, Wm. Hunter's mother and witness were present. William Hunter willed one-half his property, after his wife's death, to her children, and the other half to his relatives. The will in dispute is not that will; witness' mother made an effort, through witness' husband, to get that will. Witness visited William Hunter again in 1841, in the fall, but understood, before she went, she had no chance to get any of his property. Witness is daughter of William Hunter's wife; and from her mother and the Family Bible, she learns she was born on the 29th day of April, 1791. Since Charles Walker's refusal to use his influence in carrying out William Hunter's first will, she does not esteem him so highly as before; and the death of his first wife has not changed her feelings towards him. She knows that William Hunter's mind was as good when he made his first will, as it has been since her acquaintance with him.

Sworn to and executed in Alabama.

The depositions of Artemetia J. Lyle were offered and objected to because it was hearsay, and because it was the sayings of Charles Walker, long before he was executor, and she answers the crosses by reference to her direct answers. Objections over-ruled, and Counsel excepted.

She knew William Hunter of Twiggs County; was informed he married Mrs. Margaret Jemerson. She heard remarks made by Charles Walker to Moses Wheat, in relation to Mr. William Hunter and the disposition of his property. Mr.

Walker, ex'r, vs. Hunter *et al.*

Walker remarked to Mr. Wheat, he would do wrong to move from Twiggs County; that Moses Wheat ought to stay by William Hunter and nurse him well, and secure his property; that it was a fortune ready made, and that it was in his power to secure it, and he ought to do it. To which Mr. Wheat replied: "Charles Walker, that is not my way of doing business." Charles Walker then remarked that he, Wheat, was interested in the disposition of the property, and had more influence over him than any one else, and when he moved away somebody would get it, and that he, Mr. Walker, has as much right to it as any one else, apart from the legal heirs, and he would, after the removal of Mr. Wheat, nurse the old man and get it if he could. Mr. Wheat then asked Walker if he would have property got in that way. To which Walker replied, I had as well have it as any one else; and my motto is, to keep all I have got and get all that I can. She believes Mr. Walker's motives for using these remarks to Mr. Wheat was to convince him it was his duty, having the power, as he, Walker, believed, to influence Mr. Hunter to make as near an equal distribution of the property as he, Mr. Wheat, thought to be just, and thereby secure the property to the legal heirs. She does not believe that Mr. Walker once thought that Mr. Wheat would or ought to secure it to himself individually. But after he saw that the children of Mrs. Hunter, and the heirs of Mr. Hunter, neglected their interest, he then believed he had as good a right to secure the property to himself as any one else. She knows nothing of any previous will. She is not related to William Hunter. Mrs. Hunter was her grand-mother. Moses Wheat married the daughter of Mrs. Hunter, and witness is the daughter of Moses Wheat. The conversation (between Moses Wheat and Walker) occurred in the year 1827, at and in the house of William Hunter. Mrs. Hunter, Mrs. Wheat and Mrs. Walker were in the house at the time, but witness does not remember that either of them were in the room at the time the conversation occurred. The remarks were made, she presumes, by Mr. Walker, from the knowledge of Mr. Wheat's having sold his possessions in Twiggs, with the intention of leav-

ing the county. She resides in Chambers County, Alabama.

Sworn to and executed in Alabama.

James Ware testified he was acquainted with testator from 1805 to his death. He heard Charles Walker say William Hunter attempted to hang himself. A report had gone out of Mr. Hunter's derangement. Charles Walker said Mr. Hunter had got in a deranged way, and he carried his carriage and took him home with him. Testator never was a man of strong mind. Witness saw him at Richland meeting-house in May, 1839. He was standing off to himself, leaning against a tree, and appeared sad, serious and melancholy. He thought testator at that time of weak mind. He and witness were family connnections. He had but little to do with but few persons who had influence over him. Two or three persons were as many as had influence over him at a time. When Hunter first came to Twiggs County, William Jemerson and Moses Wheat had more influence over him than any one else. They had much influence over him. After they removed from Twiggs the most influential friends of the testator were H. H. Tarver and Charles Walker. Testator seemed to have great confidence in Chas. Walker. It might have been prejudice in witness, but it appeared to him that Hunter's mind was in about the same situation up to the time of his death. The reason which led witness to this conclusion was from a conversation held with Hunter. He called to borrow money—\$400—of him. He said he would not let him have less than a thousand dollars; witness was sent for the day the testator died, to go to his house. When he got there Charles Walker, Mrs. Walker and Charles Hunter were there. Mr. Hunter's papers were examined that night; he found no will; witness had a conversation with Charles Hunter in Charles Walker's presence. Charles Hunter was in a bad condition; he was almost deaf. Witness endeavored to get Charles Hunter to will part of his property to his poor kin. Charles Walker spoke and said, "You might as well sing psalms to a dead horse—he is in no fix to do anything." Witness never saw him afterwards in any better condition; witness was in Marion the day William Hunter's will

Walker, ex'r, vs. Hunter *et al.*

was proved. Charles Walker qualified as executor, and witness asked him, if Charles Hunter was not going to qualify too; he replied, you know as well as I do, Charles Hunter is not qualified to do any kind of business.. It was stated, in Walker's presence, that the number of Hunter's negroes was fifty ; the negroes were very likely, and would average from between four and five hundred dollars a-piece ; witness and the other persons named examined the notes and money, which, together, amounted to between thirty-two and thirty-three thousand dollars. The cotton crop of the previous year, amounting to seventy or eighty bags, was then at the gin-house. The plantation was valuable, and then worth eight or ten thousand dollars; witness has seen Charles Walker at William Hunter's a few times ; he has heard William Hunter and his wife speak of Charles Walker's being there frequently ; witness never knew of William Hunter ever before having made a will other than the one in controversy ; witness testified before the Ordinary that it was in May, 1838, he saw Hunter at Richland ; he has since ascertained he was mistaken—that it was May, 1839, by referring to the minutes of the Association ; witness, at one time, borrowed of William Hunter one thousand dollars, but this was not the time he applied for the four hundred. He remembers Tarver's note for a large amount was among the papers of Hunter ; witness never tried to get Charles Hunter to be qualified ; he advised the Court that Charles Hunter could be qualified at any future Court ; his feelings were hurt with Charles Walker on account of his suing him on the note given for borrowed money ; he had a conversation with William Hunter about the will, in which he remonstrated against the will, and might have so stated, on oath, on the former trial, but he does not now distinctly remember. Hunter then gave, as a reason, that he made his will thus, because he could not bear to separate the negroes, as they all came from one family, and he wished them kept together. William Hunter died in 1847. Charles Walker's first wife was the grand-daughter of William Hunter's wife. William Jemerson Walker and David Walker are blood relatives of William Hunter's wife. Hunter died

Walker, ex'r, vs. Hunter *et al.*

about the first of January, 1847. Witness heard from family connexion that the property came by Mrs. Hunter, his wife; and understood some time before his death that Hunter had given remainder in the negroes to Charles Walker's son

Counsel for propounder objected to all Ware's testimony, which related to Charles Hunter and his affairs. Their objections were over-ruled and they excepted.

Iverson L. Harris, Esq.: Testified he never saw Wm. Hunter but once; he received a communication containing a request to prepare a will for Wm. Hunter. At this distance of time, cannot say whether it was from William Hunter or Chas. Walker. It was one or the other; he never had any business transactions with William Hunter; he drew the will pursuant to instructions, and enclosed it in a letter to Tarversville; he don't remembor to whom. There was one item in the will he drew, giving a small piece of land to Gen. Tarver. Afterwards, Tarver spoke to him about the will; when he saw Walker, he asked him if the will he had drawn and sent for William Hunter had been executed, and Walker informed him that it had; witness believes the preamble to the will propounded is in the language of the one he drew; it has the earmarks; he cannot say Charles Walker did not send him the instructions. The letter inclosing the instructions was not in a similar hand to the signature of William Hunter to the will. The signature of the will appears like that of a paralytic man; was witness to the deed between Charles Hunter and Charles Walker, and explained to Hunter the difference between a deed and a will.

Objected to sayings about Charles Hunter and his deed. Over-ruled and excepted.

Seth Mellon testified: He was applied to to write Charles Hunter's will. Charles Walker handed him a Form Book and instructions for the will, in his, Walker's hand-writing; never had any conversation at all with Charles Hunter, about writing his will. Charles Walker does not now live in Georgia; removed in December, 1852. Charles Hunter died in September, 1851. His will was written April before. Mem-

Walker, ex'r, vs. Hunter et al.

orandum for will was furnished by Charles Walker, who requested the witness to write it in a plain, readable hand, so that Mr. Hunter could read it. Charles Hunter was staying at Charles Walker's at the time; Hunter read the will before he signed it. Walker got the witness to write it because he wrote a good hand; he was teaching school, and boarded at Walker's at the time; can't say the will was executed the same day he wrote it, but thinks it was not. Charles Hunter seemed to be reading the will; did not read it aloud; he expressed himself well-satisfied with it. Charles E. Taylor, Dr. Fraser, Judge Hansell, and Hunter and Charles Walker went to Macon the next day; Hunter was in his usual health, except having a cancer. Charles Walker's family was exceedingly kind in taking care of and nursing Charles Hunter. Charles Hunter had been staying at Charles Walker's since the first of January, 1851. When Hunter signed the will, he said that was his wish and had long been. Witness never saw any efforts on the part of Walker, to induce Hunter to make a will; does not think he testified before the Ordinary, that Charles Hunter attempted to read the will; he did not read it aloud; did not know that Charles Hunter was dim of sight; he was deaf or hard of hearing; witness testified before the Ordinary, and now repeats, that in reading the will, Hunter could not make out one word, and called on witness to explain it, which he did. The word was about the middle of the page, but he could not, at that time, designate the word. Walker had a room built for Hunter. Charles Hunter was deaf.

Counsel for propounder objected to the whole of Mr. Melton's testimony, as incompetent and irrelevant. Objection over-ruled, and they excepted.

Lewis Solomon, re-called: Swore that Signal Raineys was dead; that he testified before the Ordinary, that he was not qualified to judge of the legal capacity of William Hunter to make a will, but supposed he was capable; he was a man of ordinary grade of mind; he had contracted with witness to build him a house, and gave him a plan and paid him for it. This was, as well as he could remember, in 1839.

Walker, ex'r, vs. Hunter *et al.*

Rev. Henry Bunn: Testified he had known William Hunter a long time—twenty or twenty-five years. Their plantations joined, and they were in the habit of exchanging neighborly civilities. Hunter transacted his ordinary business very well; he lived very much in solitude, and appeared not to have as much mind as he really had; he had but few confidential friends, and in those few he had the most implicit confidence; when he once had confidence it was very strong: witness never doubted that Wm. Hunter had mind enough to arrange his will just as he wanted it; he never doubted that Mr. Hunter had mind a plenty in 1839 and 1840, to make a proper disposition of his property; he did not know so much about him in 1840; his mind was of an ordinary cast; he once seemed to have wavered in his mind; he once talked of hanging himself; thinks it was some time prior to 1839—and witness believes, about the time his wife died; witness wanted to get some money of Mr. Hunter, but he did not seem as willing to let him have it as he expected; and afterwards, when witness told him he did not want it, Hunter seemed disappointed, and wanted him to take it that year and the next; he was not what is called a sharp man, but in buying goods he bought with care and bought low down; he was a slow man, and slow to take up improvements; he was easily excited; a dry spell would excite him much; his mind once wavered; witness saw him about that time at General Tarver's. William Hunter's mind was between the two extremes of an idiot and a strong mind; as there are many grades of mind, it is hard to say what grade he had; he was always excited at a dry spell; he never would sell corn, when he had abundance, till a new crop was made; he had but few friends, and these had influence over him. William Jemerson and Moses Wheat had influence with him till they moved away, and then General Tarver had influence with him; he had confidence in Charles Walker, and thinks he had influence over him; witness had less acquaintance with William Hunter, for the seven years preceding the first of January, 1847, than before that time.

Theophilus D. Booth: Testified he knew William Hunter,

Walker, ex'r, vs. Hunter *et al.*

but was not particularly intimate with him. Has known him since witness was twelve years old, but never at his house but twice. Witness first knew Hunter when he was a school boy, boarding at William Jemerson's. After witness grew up, he and Hunter met frequently at Taryersville. The last time he saw him was in 1840 or 1845. Witness was riding by Hunter's field, where his hands were plowing near the fence. William Hunter was sitting on the fence. Witness said to him, you ought to have an overseer. Testator replied, I'll be rot if I can get a man that will do; witness replied, you have got no body to give your property to, but uncle Charley—alluding to his brother, Charles Hunter. He said, I have got somebody. I have made a will and given my negroes to Jemerson Walker. You have? said I; he replied, yes. Witness then said, what the hell and damnation did you do that for? You had better have given them to me or some poor person. Testator replied that Jemerson Walker was the son of his wife's favorite grandchild, and he did not want his negroes divided—he had never bought a negro, and he never wanted them divided—that Charles Walker's wife was the favorite grand-child of his, testator's wife, and all the negroes came from the Jemersons. Witness told Hunter he thought he once had a young man that suited him well; he replied, he thought so too; but that Humphrey had got so that he wanted him to do his way and he had to leave. Witness knew Mrs. Walker; he went to school with her. William Hunter said, on that day, that he loved Charles Walker's first wife more than any of the family of Jemersons. Witness resides in Palaski County; did not see William Hunter very frequently. He lives about fifteen miles from Tarversville, but business called him there.

Thomas Glover: Testified he knew William Hunter, but not intimately. He thinks he had intellect enough to transact ordinary business. He did attend to and superintend his own plantation; witness has seen testator in the town of Marion, buying negro shoes; he had mind enough to make a will. Some two or three years before he died, testator told witness, going home from Marion, that he had more good will for

Walker, ex'r, vs. Hunter et al.

Charles Walker's first wife than every body else, and that on that account he had given his negroes to her son; and for the additional reason, that he did not want the negroes to be scattered; witness never was at William Hunter's house; he does not think Hunter was a man of strong mind; he has seen men of weaker and stronger mind; he does not know of testator's having any particular partiality; he said he could not bear the idea of having his negroes scattered; he had great friendship for Charles Walker.

Here the testimony closed on both sides, and Counsel for the propounder of the will asked the Court to give in charge to the Jury the following instructions, as the law of the case, and which are hereto appended, and numbered from 1 to 16.

But the Court refused to give in charge all the requests as made, but proceeded to charge the Jury as follows, and is hereto appended:

The Counsel for executor requested the Court to charge the Jury—

1st. That the execution of the will is sufficiently proved by an attesting witness, who swears that he saw the two other witnesses sign and subscribe the will produced, in his presence, and signed, and subscribed in the presence of the testator, and by his request, and in presence of each other, and that one of those subscribing witnesses is dead, and the other gone off out the State, and that after inquiry, he has not been heard of.

2d. That in the case of wills, where a witness has gone off from the neighborhood and abroad, and has never since been heard of, the signature and hand-writing of such subscribing witness may be proved by another attesting witness, as in case of a deed.

3d. That the Counsel for caveator, on appeal, having permitted, without objection, after the testimony given by David Walker, an attesting witness, the will to be read to the Jury as the will of William Hunter, cannot be permitted now, and to

Walker, ex'r, vs. Hunter et al.

the Jury, to make the objection that the paper is not sufficiently proved, and as required by their citation.

4th. That if, from the evidence, the Jury believe that Wm. Hunter had sufficient sense to transact the common business of life, he had capacity enough to make a will; and his being capricious in the disposition of his property will not invalidate his will.

5th. That a lower degree of intellect is requisite to make a will, than to make a contract.

6th. That if Wm. Hunter had, at the time of making his will, mind enough to know that he was giving property to his brother, Charles Hunter, and to Wm. Jemerson Walker, he had, in law, capacity enough to enable him to make a will.

7th. That the law does not measure the extent of the understanding of a testator. That unless, under the testimony, it appears to the Jury that William Hunter was totally deprived of reason, he had mental capacity enough to make this will; and as he is the lawful disposer of his property, his will stands as a reason for his actions.

8th. That a man's capacity may be perfect to make a will and yet very inadequate to the management of other business; as for instance, to make a contract for the purchase or sale of property.

9th. That a lower degree of intellect is necessary to make a will than to make a contract—that a mere glimmering of reason is sufficient.

10th. That it is not necessary, in order to establish a will, that the executor, or person claiming under the will, should prove that the will was read over to the testator, in the presence of the attesting or other witness.

11th. That the law presumes, in general, that the will was read by or to the testator.

12th. That David Walker and Thomas D. Walker, the brothers of the executor of the will, and attesting witnesses to the will, are competent and credible witnesses in law, and that by reason of their relationship to Charles Walker, the executor, no stain necessarily attaches to the testimony of such relations.

Walker, ex'r, vs. Hunter *et al.*

13th. That the opinion of witnesses as to the capacity of a testator, or in reference to any undue influence over him, are entitled to little or no regard, unless they are supported by good reasons, founded on the facts which warrant them in the opinion of the Jury.

14th. That fraud is never to be presumed: That when circumstances are relied on to establish its existence they should be so strong, when combined and examined, as to *satisfy* the Jury of the existence of the fact they are adduced to establish. That it will not do if they affect the judgment with nothing more than doubt and suspicion.

15th. That unless the Jury are satisfied from the testimony in the case, that it has been proved that Wm. Hunter made the will in controversy through constraint or fear; or under compulsion or threat; without freedom of person or mind; or made it through excessive importunity, extorting from him, the said Wm. Hunter, what he was unwilling to grant or give, and which he had not firmness of mind or ability to withhold; no such *undue influence* is established, or can be established, by other means or modes of proof to authorize any Court or Jury to set aside the will of said Wm. Hunter, on *that ground*.

16th. That if the Jury believe from the testimony in the case, that Wm. Hunter had mind enough to make a will on the 16th November, 1839; that the will was formally executed by him and attested, as the law directs; that he had volition, design, purpose, intention to dispose of his property by the will as he has done, they are bound to find in favor of the will; and that no tribunal can pronounce against it because of its disapprobation, *however strong*, of the dispositions made by the testator of his property.

The Court charged the Jury as follows:

The cause you are called on to try is on the last will and testament of William Hunter, deceased. Charles Walker alleges that this paper is the will of William Hunter, and that he is the executor therein named; and asks that you, by your verdict, should so declare it, and admit it to record. The ca-

Walker, ex'r, vs. Hunter *et al.*

veators deny, in fact and in law, that it is the will of deceased, It is a right which the law gives to every individual of sound and disposing mind and memory, unless under legal disability, to dispose of his property, by last will and testament, in such manner and to whom he pleases, if he contravenes no rule of law in such disposition. It is immaterial how repugnant his disposition may be to our ideas of propriety and to the claims of blood, if he acts without restraint, and freely and voluntarily wills, being competent so to do, his act shall stand—he has only exercised his rights under the law. If, however, he is incompetent to make a will, from mental imbecility, or should execute one, influenced by fraud, duress or force, it will not, in law, be allowed to stand, because such an instrument would not, in fact, be the will of the pretended testator; it is not the free and voluntary act of his mind, but the will of another: not that of the alleged testator.

This paper was originally produced in the Court of Ordinary, and admitted to probate, in what is called common form, by Charles Walker, the person or one therein named as executor. This probate in common form is an *ex parte* proceeding, and is not conclusive; for in common form it is provable on the oath of the executor and one witness, without notice to the parties in interest. But after this, within a certain time limited by law, it is competent for the executor, himself, to proceed to its proof in solemn form, by an examination of witnesses before all those interested, to whom previous notice is to be given; or for any party in interest to call on the executor to bring in the will and prove it by an examination of the witnesses before all the parties, who have a right all to be present, to cross-examine the witnesses, and produce witnesses in opposition to the alleged will, all having any interest in the question, being previously notified of the proceedings.

In this case, the heirs at law of William Hunter have heretofore called on Mr. Walker to prove this will in solemn form before the Ordinary of this county—he has proceeded so to do. And, on hearing the proof in the cause, his Honor, the Ordinary of Twiggs County, passed an order and judgment in favor

Walker, ex'r, vs. Hunter *et al.*

of the validity of the will, and admitted the same to probate in solemn form; from which judgment of the Ordinary the heirs at law of William Hunter have appealed to this Court. That appeal brings the case before you for decision.

The question to be settled by you now is, whether this paper offered by Mr. Walker, shall be established by your verdict as the last will and testament of William Hunter, deceased. This you are to determine, irrespective of any thing which has heretofore been done judicially in the premises; but you are to determine this issue on the evidence before you, applying thereto such rules of law as shall be given you in charge by the Court.

The instructions prayed by the parties on either side are so full, and cover so fully all the points in the case, that I shall, in the charge, confine myself to these instructions—either to giving them as prayed for, refusing or qualifying them, as in my judgment may be right.

And the first point made is, as to the manner in which the execution of this paper, itself, has been proven before you. Only one of the subscribing witnesses, to-wit: Mr. David Walker, has been produced on the stand. The heirs at law call on the Court to charge, that it is "the duty of the executor called on to prove a will in solemn form, to produce the subscribing witnesses thereto, and prove the testable capacity, and testamentary intentions of the testator."

Counsel for the propounder, Charles Walker, requests the Court to charge—

That the execution of the will is sufficiently proved by an attesting witness, who swears that he saw the two other witnesses sign and subscribe the will produced, in his presence, and signed and subscribed in the presence of the testator, and by his request and in the presence of each other, and that one of the subscribing witnesses is dead, and the other gone off out of the State, and that, after inquiry, he has not been heard of.

On the one side it is required that all the witnesses be produced, or proof of the execution fails. On the other, that one is sufficient; and on his testimony the Jury must set up the will. The heirs at law say but one witness has been produced

Walker, ex'r, vs. Hunter *et al.*

and sworn before the Jury; there are three to the paper; the law requires all shall be produced and sworn; you must find against the will; the executor has failed even to prove its execution. The propounder says: You must decree in favor of the will, because one subscribing witness has sworn before you that he saw the others sign; they signed in the presence of the testator and each other, and at testator's request; one is dead, the other gone, and, after inquiry, cannot be found.

In my opinion, the law is not as contended for by either party, but that the true rule lies between them. The very object of proving a will in solemn form, is to have a thorough investigation, because the decision predicated thereon is to be final and conclusive, as to the character of the paper. It is therefore obviously the duty of the person setting it up, to produce all the evidence in his power or custody, which establishes its validity; and his failure to do so would insure defeat. An executor proposing, therefore, to prove a will in solemn form, would be compelled to produce all the subscribing witnesses, if in his power to do so. But if it is impossible for him so to do, shall the will utterly fail and an intestacy be declared? I think not. I am of the opinion that its execution may be proven on the testimony of one or more subscribing witnesses, and what, in law, is called the *adminicular proofs*. But the impossibility of producing the others must be clearly and fully made, to the satisfaction of the Jury. You are not necessarily bound to set up this paper as a will, on the testimony of David Walker alone, because you may not be satisfied with the proofs, in aid of his testimony offered by the executor. The death of Thomas Walker, and his hand-writing, and the hand-writing of Lee, you may think, might also have been proven by other persons, and this would have been in aid of the testimony of the one subscribing witness. Also, you may not be satisfied that the other witness, Lee, could not have been produced by the executor, after proper effort made. If you should not be, then you would be at liberty to find against the execution of the instrument, in the opinion of the Court; and therefore, the Court declines to charge you as requested; and in the law-

Walker, ex'r, vs. Hunter et al.

guage as requested, of the Counsel for Charles Walker. But on the other hand, if you are fully satisfied, from the evidence before you, that Thomas Walker, one of the subscribing witnesses to this paper, is dead; that Lee, the other, is out of the jurisdiction of the Court, and that it is not in the power of Walker to have produced him, and that he has made all reasonable efforts so to do; furthermore, that it has been proven by other witnesses, that the deceased intended to make a will such as this, before it was made; and that afterwards, he had made such a one, (this species of proof being adminicular, as I understand the term). And furthermore, from all the facts in evidence before you, you be satisfied that the testimony of David Walker is supported, aided and corroborated, you will be justified in finding, by your verdict, the execution, *itself, of the paper, as a will,* has been sufficiently proven; and therefore, I refuse to charge in the language as requested by the heirs at law of the deceased. This point seems not to have been anticipated until the trial. Little or no direct authority has been produced. The Court has therefore charged the Jury according to the best of its impressions, but with some doubt.

As to the latter part of the request of the heirs at law, that the testator's capacity and testamentary intentions must be proved by the executor, the Jury are charged, that this duty does devolve on the executor; and on his failure to make this proof, he is defeated. As to what constitutes testable capacity, it will be explained hereafter; and as to testamentary intentions, his design to make *a will*, must appear at the time he executed the paper purporting to be his will. The evidence, on this point, is before you for your consideration.

Again, the heirs at law request the Court to charge—

“That a person has no right, and it is unlawful for him, to move a testator to make him his executor or give his goods, when the testator is a person of weak judgment and easy to be persuaded, and the legacy great.”

I am satisfied that this is a correct rule of law, and give it to you in charge as requested. If you believe, from the evidence, that the deceased was a person of weak judgment, and easily to-

Walker, ex'r, vs. Hunter *et al.*

be persuaded, and that Walker moved him to make him, Walker, his executor, and that the legacy to him or his children was great, the Jury are at liberty to set aside the will. It must be the free and voluntary act of the mind of the testator, which it is very obvious it could not be, if the pretended testator, under disabilities such as these, was moved and incited by another to will in his favor.

Again, they request me to charge—

“That when the testator is circumvented by fraud, the testament is void and of no force.”

The Court most cheerfully gives you this rule in charge, to the full extent of the request. If you are of opinion, from the evidence, that the alleged testator in this case was circumvented by fraud, it makes no difference who was the actor in the fraud, it vitiates the whole will: it cannot be established as the will of the deceased, if it is the fruit of fraud practiced on him.

And again—

“That fraud in obtaining a will, like fraud in other cases, though not to be presumed, may be proved by circumstances.”

This also is undoubtedly a sound rule of law. It is often-times impossible to prove the existence of fraud positively: “it lurks in the dark,” as it is sometimes said, but a well connected chain of circumstances may establish beyond doubt its identity—its existence. If the Jury are satisfied, from the circumstances in evidence before them, that fraud has been perpetrated on the deceased, to induce him to make this instrument as his will, they may act on convictions thus derived, though they have no positive proof of the fact. And to enable you to determine for yourselves this question, all the facts connected with this transaction are before you.

Again, they request me to charge you—

“That in cases of undue influence and imposition, confirmation of the act does not remove the imputation.”

I am not prepared to go the whole length of this request. It needs some qualification, in my opinion. The confirmation of an act, done undue influence and imposition, of course is a nullity, if the influence and imposition exist at the time of

Walker, ex'r, vs. Hunter *et al.*

the confirmation; and perhaps a presumption in favor of its existence, at that time, is raised. But if it be shown, that an act done under undue influence and imposition, afterwards, and when entirely removed from all undue influence, and aware of the former imposition, the actor confirms his previous act, his confirmation does remove the imputation. But if the evidence establishes undue influence and imposition, and nothing but the simple act of confirmation, without showing under what circumstances the act of confirmation was made, such confirmation does not remove the imputation, because the influence is supposed to remain. Therefore, if the Jury should think, from the evidence, that William Hunter executed this paper as his will, under undue influence and imposition, and the evidence should also show that afterwards he confirmed the act, such evidence of confirmation shall not remove the imputation. But if the evidence shows that the confirmation was free from influence or imposition, with a full knowledge of his position and his rights, such an act would give vitality to his former act, and remove all imputation.

Again, on the other side, Counsel for Charles Walker requests the Court to charge—

That in the case of wills, where a witness has gone off from the neighborhood and abroad, and has never since been heard of; the signature and hand-writing of such subscribing witness may be proved by another attesting witness, as in case of a deed.

The Jury have doubtless understood, from what I have already said, that I do not regard this proof as sufficient, without the aid of the administricular proofs or circumstances. If this proof stands alone, in the opinion of the Jury, then the execution of the will, in the Court's opinion, is not sufficiently proven; but supported (if the Jury think it is) by other facts and circumstances, it may be sufficient to admit the will to probate. The Court cannot but remark, that this method of proving the signature and hand-writing of the absent witness is objectionable —does not strengthen the witness sworn—and the neglect to

Walker, ex'r, vs. Hunter *et al.*

prove by others the hand-writing of the absent witness, is an administrical circumstance in proof against the execution of the will.

Again they request me to charge—

“That the Counsel for caveator on appeal, having permitted, without objection, after the testimony given by David Walker, an attesting witness, the will to be read to the Jury as the will of William Hunter, cannot be permitted now, and to the Jury, to make the objection, that the paper is not sufficiently proved, and as required by their citation.”

I decline to give this request in charge to the Jury. The contrary thereof is the law, in the opinion of the Court. The execution of the will is one of the material facts the executor is called on to prove in solemn form before this Jury; and it is for the Jury to say now, by their verdict, whether he has done so agreeably to the requirements of the law. Its proper execution is a mixed question of law and fact, and the proof has been submitted and the issue thereon formed. The Court has given to the Jury its instructions on the law arising under this head, and it is the province of the Jury to apply the facts in evidence to these rules of law; and as they may determine, so to find.

Again, they request—

“That if, from the evidence, the Jury believe that Wm. Hunter had sufficient sense to transact the common business of life, he had capacity enough to make a will; and his being capricious in the disposition of his property, will not invalidate his will.

“That a lower degree of intellect is requisite to make a will than to make a contract.

“That if Wm. Hunter had, at the time of making his will, mind enough to know that he was giving property to his brother, Charles Hunter and to Mr. Jemerson Walker, he had, in law, capacity enough to enable him to make a will.

“That the law does not measure the extent of the understanding of a testator. That unless, under the testimony, it appear to the Jury that Wm. Hunter was totally deprived of

Walker, ex'r, vs. Hunter *et al.*

reason, he had mental capacity enough to make this will; and as he is the lawful disposer of his property, his will stands as a reason for his actions.

"That a man's capacity may be perfect to make a will, and yet, very inadequate to the management of other business; as for instance, to make a contract for the purchase or sale of property.

"That a lower degree of intellect is necessary to make a will than to make a contract; that a mere glimmering of reason is sufficient."

These, gentlemen, in the opinion of the Court, are established rules of law in reference to testable capacity. Indeed, it is believed that the Counsel has copied these requests *verbatim*, from opinions delivered by our Supreme Court, in cases in which the question of capacity was raised. They are therefore absolutely binding on this Court and Jury. But the Counsel for the heirs at law, has notified you and the Court also, that they do not contend that the deceased had *no* mental capacity sufficient to make a will; they rest their opposition on the ground of undue influence and imposition, he being a person of weak mind and judgment.

I have already informed you, that the capricious manner in which a testator may dispose of his property, does not invalidate his will, if he is otherwise competent to will. Under the law, he has the right to make his own will; and it shall stand, although not in conformity to our notions of propriety, justice, or the claims of kindred.

Again, they request me to charge—

"That it is not necessary, in order to establish a will, that the executor or person claiming under the will, should prove that the will was read over to the testator, in the presence of the attesting or other witness.

"That the law presumes, in general, that the will was read by or to the testator."

You are instructed, gentlemen, that this request embodies the correct rule of law on this subject. The testator is presumed to have read the will; and therefore, it is not necessary

Walker, ex'r, vs. Hunter et al.

that it should be proven to have been read over to testator in presence of the witnesses.

Again, they request the Court to charge—

“That David Walker and Thomas D. Walker, the brothers of the executor of the will, and attesting witnesses to the will, are competent and credible witnesses, in law; and that by reason of their relationship to Charles Walker, the executor, no stain *necessarily* attaches to the testimony of such relations.”

The Court is of opinion that they are certainly competent witnesses, and that their relationship to Charles Walker, the executor, the party to the suit, does not necessarily stain their testimony. It is, however, for the Jury to determine what degree of weight and credit they think due to the testimony of the witness or witnesses; and the fact of relationship by the witness to the party, ought to be considered by the Jury, in arriving at a conclusion or estimate of the credit due to the witness, together with every other circumstance or fact in evidence before them, bearing on the question of credibility.

Again, the Court is requested to charge—

“That the opinion of witnesses, as to the capacity of a testator, or in reference to any undue influence over him, are entitled to little or no regard, unless they are supported by good reasons, founded on the facts which warrant them in the opinion of the Jury.”

In the opinion of the Court, this is a reasonable and sound rule. The opinion of a witness, merely as an opinion, is worth but little—perhaps wholly incompetent testimony; but when accompanied with all the facts and reasons on which that opinion is predicated, the Jury entertain not the opinion itself, but the fact, in order to see whether they arrive at the same or a different conclusion, agreeable to the legitimate effects thereof.

Again, the Court is requested to charge—

“That fraud is never to be presumed; that when circumstances are relied on to establish its existence, they should be so strong, when combined and examined, as to satisfy the Jury of the existence of the fact they are adduced to establish.

Walker, ex'r, vs. Hunter et al.

"That it will not do if they affect the judgment with nothing more than doubt and suspicion."

The Jury are instructed in favor of this request, in its full extent, as prayed for. If the circumstances create in the minds of the Jury only a doubt or suspicion of fraud, they are not to presume fraud. They must be satisfied in their minds of the existence of the fraud, from all the circumstances in evidence before them.

Again, it is requested that the Court charge—

"That unless the Jury are satisfied from the testimony in the case, that it has been proven that Wm. Hunter made the will in controversy through constraint or fear; or under compulsion or threat; without freedom of person or mind; or made it through excessive importunity, extorting from him, the said Wm. Hunter, what he was unwilling to grant or give, and which he had not firmness of mind or ability to withhold. No such undue influence is established, or can be established, by other means or modes of proof to authorize any Court or Jury to set aside the will of said Wm. Hunter on that ground."

Again, and lastly, the Court is required to charge—

"That if the Jury believe, from the testimony in the case, that Wm. Hunter had mind enough to make a will on the 16th November, 1839; that the will was formally executed by him and attested as the law directs; that he had volition, design, purpose, intention to dispose of his property by the will as he has done, they are bound to find in favor of the will; and that no tribunal can pronounce against it because of its disapprobation, however strong, of the dispositions made by the testator of his property."

You therefore see that it will be your duty, on this trial and investigation, to determine—

1st. Whether, from the evidence, and the law applied thereto as given you in charge, this paper has been properly and legally executed. If on this point you are satisfied with the testimony, then you will see whether the testator, at the time the will was made, was of sound, disposing mind and memory, as shall appear to you from the evidence and the law, as given

Walker, ex'r, vs. Hunter *et al.*

you in charge on this branch of the inquiry. You will then ascertain, also, from the evidence, whether the testator executed the alleged will, freely and voluntarily; whether it was the act of his own mind to make this will; to make it as it appears here before you; and whether he did so execute it, free from all illegal and improper control or restraint over him, as defined by the rules of law laid down for your guidance under this head of inquiry. And as you believe from the evidence, so declare by your verdict.

The Jury retired and found in favor of the will, declaring it the last will and testament of William Hunter, duly proved, and entitled to record.

When the Counsel for the caveator then and there, during the said March Term, 1854, of the Twiggs Superior Court, moved for a new trial in said cause, upon the following grounds, *to wit*:

1st. That the Court erred in deciding that respondent's Counsel had the right, in law, to open and conclude the argument before the Jury in said cause.

2d. Because the said respondent failed to prove in solemn form the paper proven in common form, to be the will of William Hunter, deceased, the testator.

3d. Because the said paper was not proven to be the will of the said William Hunter, deceased.

4th. Because the verdict of the Jury was contrary to evidence and the weight of evidence.

5th. Because the verdict of the Jury was contrary to the charge of the Court.

6th. Because the verdict of the Jury was contrary to law.

7th. Because the Court erred in its charge.

8th. Because, while the cause was pending before the Special Jury, E. E. Crocker, one of the Counsel for the respondent, on the night of the 23d March inst. entertained at his house two of the special Jury to whom the said cause was submitted for trial, and the respondent, Charles Walker.

9th. Because a paper was found in the room of the Special J.

Walker, ex'r, vs. Hunter *et al.*

ry, by the Jury, to which said Jury retired to make up their verdict, of which the following is a copy, which was calculated to misdirect the Jury as to the true issue before them, to-wit:

"The burden of the effort made by Colquitt before the Jury, is to show fraud on the part of Walker in Charles Hunter's will, which is not the issue before the Jury. Nothing relating to Charles Hunter's will ought to be allowed, but the issue—was William Hunter capable, in law, to make a will. The Jury will in particular act upon the evidence in the case, and the law given them in charge. I fear the erroneous impression is now made in the mind of two or more of the Jury."

The Court, after hearing argument on the above motion, and considering the same, and being of opinion that respondent's Counsel had the right, in law, to open and conclude the argument before the Jury in said cause, over-ruled the first ground taken in the motion for a new trial, and refused to grant a new trial on that ground.

But the Court being of opinion that the said Charles Walker, the executor and respondent, failed to prove the will of the said William Hunter, the said testator, in solemn form, being the paper proven in common form, to be the will of the said William Hunter, the said testator, and being of the opinion that the execution of said will was not sufficiently proven; and the Court being further of opinion, that the verdict of the Jury in said cause was contrary to evidence and the weight of evidence, and was contrary to the charge of the Court, and contrary to law; and the Court being further of opinion, that the fact, that while the cause was pending before the Special Jury, E. E. Crocker, Esq. one of the Counsel for respondent, on the night of the twenty-third March, entertained at his house two of the Special Jury to whom the said cause was submitted, and the respondent, Charles Walker, was illegal and inadmissible in law; and the Court being also of opinion, that the paper in the hand-writing of Lewis Solomon, and found by the Jury in their room, was calculated to mislead the Jury and im-

Walker, ex'r, vs. Hunter et al.



fluence their finding: it was therefore ordered and adjudged by the Court, that for the said reasons, the verdict of the Jury in said cause be set aside, and a new trial be awarded and had in said cause.

The errors assigned were—

- 1st. That the Court erred in permitting David Walker to testify about Charles Hunter and his property.
- 2d. The Court erred in admitting in evidence Charles Hunter's will.
- 3d. It erred in admitting in evidence the deed from Charles Hunter to Charles Walker.
- 4th. It erred in admitting the testimony of Samuel Jemerson about a former will of William Hunter, and the sayings of his mother.
- 5th. It erred in admitting the testimony of Humphrey Jemerson about the sayings of Charles Walker, long before he was executor or the will was made.
- 6th. He erred in admitting in evidence the testimony of Mrs. Wheat about a former will, and as to what her mother told her.
- 7th. He erred in admitting in evidence Mrs. Lyle's testimony as to her hearing others say, and as to the sayings of Charles Walker before he was executor, or before the will was made.
- 8th. He erred in admitting James Ware to testify as to the capacity of Charles Hunter, and about his property.
- 9th. He erred in admitting the testimony of Mrs. Harris about a deed made by Charles Hunter.
- 10th. He erred in admitting all or any of Mr. Mellon's testimony.
- 11th. He erred in over-ruling the motion to strike out the second and fourth grounds in the caveat.
- 12th. The Court erred in sustaining the motion for a new trial.
- 13th. The Court erred in granting a new trial in said cause upon any or either of the grounds sustained by the Court.

Walker, ex'r, vs. Hunter *et al.*

S. T. BAILEY; I. L. HARRIS; MILLER & HALL, for plaintiff in error.

SCARBOROUGH; McDONALD, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Was it right to grant the new trial? That is the sole question in this case.

The Court below put its decision granting a new trial, on a number of grounds, viz: That the paper propounded as the will of Hunter had not been proven, in solemn form, to be his will.

That the execution of that paper had not been sufficiently proven.

That the verdict of the Jury was contrary to the evidence, and the weight of the evidence—contrary to the charge of the Court and contrary to law.

That one of the Counsel for Walker entertained at his house one night during the trial, Walker and two of the Jury.

That the paper in the hand-writing of Solomon, found by the Jury in their room, was calculated to mislead the Jury.

If any one or more of these grounds were good, whether the others were good or not, the new trial was properly granted, and the judgment granting it ought to be affirmed. This Court might, therefore, content itself with pointing out such of the grounds as it considers good, if such there are, and go no further; but as the decision of the Court below was placed on all the grounds, it will not be improper, and probably will be best, for obvious reasons, even in case of an affirmance, that this Court shall consider all the grounds, though it may think some only of them good. That, therefore, will be done. In doing it, however, the grounds will be taken up in a different order from that in which they have just been stated.

Walker, ex'r, vs. Hunter et al.

Was the verdict contrary to the evidence, or to the weight of the evidence? This is the ground I shall begin with.

As to this ground, the Counsel for the plaintiff in error say, first, that the verdict was *not* contrary to the evidence or to the weight of the evidence; and secondly, that if the verdict was contrary to either, it was so only because a part of the evidence was illegal evidence, namely: so much as related to Charles Hunter—to his deed, to his will and to his property—so much as related to a former will of Wm. Hunter, and to the sayings of his wife, and so much as related to the sayings of Charles Walker and others, before he, Walker, became executor, or before the trial had been made.

The latter of these replies will be noticed first. Is it true that this part of the evidence was illegal evidence?

The reason given by these Counsel for saying that the evidence relating to Charles Hunter, to his property, to his will and to his deed, was illegal, was, that it was irrelevant; that it could have nothing to do with an issue concerning a paper propounded as the will of another man, Wm. Hunter.

What, then, was the issue and what the nature of the evidence in question?

The caveator, among other things, alleged, in substance, that Charles Walker, with the design of acquiring for himself or a son, or both, the property of Wm. Hunter, a person not akin to either him or his son, by the use of undue influence and fraudulent contrivances, induced William Hunter to make the propounded paper as his will; that though, by that paper, a portion of Wm. Hunter's property was given to Charles Hunter; yet, that Charles Hunter was a person of great weakness of mind, and one entirely under the influence of Charles Walker, and that the giving of a portion of the property to Charles Hunter, was, in effect, the same as giving that portion directly to Charles Walker, as was proved by the result, which was, that Charles Hunter, after the death of Wm. Hunter, partly by deed and partly by will, gave all of the portion of the property given him by Wm. Hunter's will to Charles Walker. This, in substance, is alleged by the caveator.

Walker, ex'r, vs. Hunter *et al.*

Now so much of this allegation as refers to Charles Hunter, his property, his deed and his will, the evidence objected to about him, his property, his deed and his will, tends to prove. This becomes apparent by merely reading that evidence.

The position, therefore, that that evidence was illegal, because irrelevant, is not well founded.

The only reason assigned in argument, by the Counsel for the propounder of the paper, to show the evidence of Mrs. Wheat and Samuel Jemerson, giving the sayings of their mother, spoken after her marriage with Wm. Hunter, in relation to a former will made by Wm. Hunter, to have been illegal, was, that the evidence was hearsay—was only of the sayings of Mrs. Hunter.

But as to Mrs. Wheat, it is not apparent that this reason is true, in point of fact. It is true, Mrs. Wheat swore this: "Witness' mother made an effort through Mr. Wheat, her son-in-law, soon after the death of Dowsing, to get possession of said will, but was informed said will could not be found amongst Esquire Dowsing's papers." But that this contains any thing that is hearsay, is far from clear.

And as to the evidence of Jemerson, he does, indeed, say this: "He once had a conversation with his mother, then the wife of Hunter, in which she informed him that her husband had made a will, and had given one half of his property to his people, and the other half to her people." But then he immediately adds this: "That some seven or eight years after the death of his mother, he communicated to Wm. Hunter what his mother had told him, and asked him if he had made such a will? and he answered, that he had, but that since the death of his wife he had burnt it." And this addition makes what had been the sayings of the witness' mother, become, in effect, the sayings of Hunter. And any sayings of his were legal evidence.

The reason, then, assigned by the Counsel for the propounder, to show this evidence to have been illegal, is not sufficient.

The sayings of Chas. Walker, which it was argued were illegal evidence, were those proved by Mrs. Lyle, and one

Walker, ex'r, vs. Hunter *et al.*

proved by Humphrey Jemerson. And the objection to these sayings was, that they happened before the making of the paper propounded as Hunter's will; and therefore, before Chas. Walker could have been executor of that will; and so, that the sayings, when made, were such as could neither be against the interest of Walker, or as could bind those claiming under the paper propounded as the will of Hunter.

This objection to the evidence of both of these witnesses, as matter of fact, exists. And as to the evidence of one of them, Humphrey Jemerson, it is sufficient, as matter of law. But it is not so sufficient as to the evidence of the other, Mrs. Lyle, for her evidence is admissible on another ground. The sayings of Chas. Walker, to which she testifies, make part of the transaction as much a part of it as does the fact that the paper was executed at Chas. Walker's house make part of it. Those sayings are: "that he, Wheat, was interested in the disposition of the property, and had more influence over him than any one else; and when he moved away somebody would get it, and that he, Mr. Walker, has as much right to it as any one else, apart from the legal heirs, and he would, after the removal of Mr. Wheat, nurse the old man and get it if he could."

But as to the sayings testified to by Humphrey Jemerson, they manifestly make no part of the transaction—of any transaction in which Walker took part. They are merely to the effect, that the witness, that Humphrey Jemerson, not Walker, could influence Hunter to give him, Jemerson, all his property.

They were not admissible, therefore, as a part of the *res gestae*. And that being so, having been made before Walker became executor, they were not admissible at all.

It is, as to this evidence, then, of Jemerson; and this only, that the Counsel for the plaintiff in error are right in saying, that a part of the evidence in the case was illegal.

But this is a very small part of the whole evidence—too small a part to warrant this Court in believing that the verdict turned upon it.

It remains to say, that in the opinion of this Court, the

Walker, ex^r, &c. Hunter *et al.*

Counsel for the plaintiff in error do not establish their position, *viz*: that if the verdict was contrary to the evidence, or the weight of evidence, it was so because a part of the evidence was illegal.

As to their other position on this point—the position, that the verdict was not contrary to the evidence or to the weight of the evidence, supposing the evidence to have been all legal, we express no opinion. That we should express one is not necessary, as on other grounds, we shall affirm the judgment granting the new trial; and as it is to be presumed that the new Jury, should this same evidence come before them, will, of themselves, rate it at its proper value.

The next of the grounds on which the Court put its judgment—granting the new trial, which will be noticed is, the ground, that the verdict was contrary to the *charge* of the Court.

In respect to this ground, the Counsel for the plaintiff made a reply, somewhat similar to that which, as we have seen, they made in respect to the ground just considered. They said that a part of the charge was law and a part not law, and that though the verdict might perhaps be contrary to the latter part, it was not contrary to the former; and so, that the verdict, even if contrary to such latter part, ought not to be disturbed.

Of the part of the charge which they insisted was not law, the following is a portion: "An executor proposing, therefore, to prove a will in solemn form, would be compelled to produce all the subscribing witnesses, if in his power to do so. But if it is impossible for him so to do, shall the will utterly fail, and an intestacy be declared? I think not. I am of opinion that its execution may be proven on the testimony of one or more subscribing witnesses, and what, in law, is called the *adminiculär proofs*. But the impossibility of producing the others must be clearly and fully made, to the satisfaction of the Jury. You are not necessarily bound to set up this paper as a will, on the testimony of David Walker alone, because you may not be satisfied with the proofs in aid of his testimony offered by

Walker, ex'r, vs. Hunter *et al.*

the executor. The death of Thomas Walker, and his hand-writing, and the hand-writing of Lee, you may think, might also have been proven by other persons; and this would have been in aid of the testimony of the one subscribing witness. Also, you may not be satisfied that the other witness, Lee, could not have been produced by the executor after proper effort made. If you should not be, then you would be at liberty to find against the execution of the instrument, in the opinion of the Court; and therefore, the Court declines to charge you as requested, and in the language as requested by the Counsel of Chas. Walker. But on the other hand, if you are fully satisfied, from the evidence before you, that Thomas Walker, one of the subscribing witnesses to this paper, is dead; that Lee, the other, is out of the jurisdiction of the Court, and that it is not in the power of Walker to have produced him, and that he made all reasonable efforts so to do; furthermore, that it has been proven by other witnesses, that the deceased intended to make a will such as this, before it was made, and that afterwards he made such a one (this species of proof being admissible, as I understand the term): and furthermore, from all the facts in evidence before you, you be satisfied that the testimony of David Walker is supported, aided and corroborated, you will be justified in finding, by your verdict, the execution, *itself, of the paper, as a will,* has been sufficiently proven; and therefore, I refuse to charge in the language as requested by the heirs at law of the deceased."

This portion of the charge the Court gave instead of one which the Court was requested by the plaintiff to give, and of one which it was requested by the defendant to give. That which it was requested by the defendant to give, was as follows: "that it is the duty of the executor called on to prove a will in solemn form, to produce the subscribing witnesses thereto, and prove the testable capacity and testamentary intentions of the testator."

That which the Court was requested by the plaintiff to give, was as follows: "That the execution of the will is sufficiently proved by an attesting witness, who swears that he saw the two

Walker, ex'r, vs. Hunter *et al.*

other witnesses sign and subscribe the will produced, in his presence, and signed and subscribed in the presence of the testator, and by his request, and in presence of each other, and that one of the subscribing witnesses is dead, and the other gone off out of the State, and that after inquiry he has not been heard of."

Considering what the Court charged and what it refused to charge, we think the Court meant to declare this to be the law, viz: that in no case is the evidence of one witness sufficient to prove the execution of a will, in a proceeding to establish the will in solemn form; that in every case the evidence of at least two witnesses is necessary, of which evidence, however, if that of one of the two goes to the main fact, the signing and publishing, that of the other need go no further than to some adiuncticular facts. We suppose, indeed, that the Court intended to tell the Jury, that in a proceeding to establish a will in solemn form, the law which governs as to evidence, is the general law of the Ecclesiastical Courts, according to which one witness does not make full proof. (1 Wms. Ex'rs, 214.)

If we are right in this, the questions are, first, what is the number of witnesses which the law of the Ecclesiastical Courts require in such a proceeding. Secondly, will other Courts, when such a proceeding is taking place before them, observe that law, whatever it is, in preference to the law which they use in proceedings peculiar to themselves?

If we make decided cases the criterion, we cannot, with certainty, say that it is the law of the Ecclesiastical Courts, that they shall require more witnesses than one to the execution of a will. In the case of *McKenzie vs. Yeo*, (7 Eccl. Rep. 408) a case which, in the opinion of the Court deciding it, depended upon the evidence of but a single witness, the Court, it is true, refused to consider the will proved—but the Court, according to my understanding of what it says, puts its decision not on the ground that the evidence was the evidence of only one witness, but on the ground that the evidence was, in itself, not credible, all the facts of the case considered. My inference from what is said in that case is, that if there had been no evi-

Walker, ex'r, vs. Hunter *et al.*

tervailing facts in the case, the evidence of the one witness would have been held sufficient to prove the will.

And in the case of *Moore vs. Payne*, (2 *Lee Eccl. Rep.*) Sir George Lee said that the proof of a will is by the *jus gentium*, and that by that law, one witness is sufficient—adding, however, that in the case of only one witness, there should be some ministerial proof to corroborate him. But does the *jus gentium*, I ask, recognize this doctrine of the necessity of ministerial proof, when there is but one witness?

Then it is beyond question the law that the Ecclesiastical Courts dare not, on pain of a prohibition, require more witnesses than one to the payment of a legacy, to the execution of a release, to the revocation of a will, to a defence against the subtraction of titles. *Shattoe vs. Friend*, (3 *Mod.* 283). *Breedon vs. Gill*, (1 *Ld. Raym.* 221.)

And what reason can there be for the law's being content with one witness in these cases, which does equally exist for its being content with one in the case of the probate of a will.

There is, however, it must be admitted, in Godolphin's Orphan's Legacy this passage: "But regularly, a single witness, without other ministerial proof, is not sufficient to prove a will, as in the case of *Chadron against Harris*, where it is said that if the Ecclesiastical Court proceed in a manner that is mere spiritual and pertinent to their Court, according to the Civil Law, although their proceedings are against the rules of the Common Law, yet a prohibition does not lie. As if they refuse a single witness to prove a will, for the consciousness of that belongs to them." The same thing is said by other elementary writers, and perhaps by some Judges in the course of a decision. (1 *Wms. Ex'r, Pt. I. Bk. IV. ch. 3, sec. 5.* 18 *Vin. Ab. Prohibition*, (Q.) I doubt whether this position rests anywhere upon a better foundation than an *obiter dictum*. But of this I cannot be certain, as the case of *Chadron against Harris*, is reported in *Noy*—a report not within my reach.

Suppose it, however, to rest on a decided case, and so to be taken as law, how much does it amount to? this much: that the temporal Courts will not, in any case, step forward and pro-

Walker, ex'r, vs. Hunter *et al.*

hibit the spiritual Courts, in a proceeding for the probate of a will before those Courts, from requiring more witnesses than one to prove the will. It does not amount to saying that the temporal Courts themselves, in a proceeding before them, involving the proof of a will, must, in every case, require the evidence of more witnesses than one to make out the proof of the will. And if it did, it would be contradicted by a great number of decided cases.

The result of those decided cases is, I think, well stated by Greenleaf in his work on Evidence, in the following words: "It is ordinarily held sufficient, in the Courts of Common Law, to call one only of the subscribing witnesses, if he can speak to all the circumstances of the attestation; and it is considered indispensable that he should be able, alone, to prove the perfect execution of the will, in order to dispense with the testimony of the other witnesses, if they are alive and within the jurisdiction. But in Chancery, a distinction is taken, in principle, between a suit by a devisee, to establish the will against the heir, and a bill by the heirs at law, to set aside the will for fraud, and to have it delivered up. For, in the former case, a decree in favor of the will is final and conclusive against the heir: but in the latter, after a decree against him, dismissing the bill, his remedies at law are still left open to him. It is therefore held incumbent on the devisee, whenever he sues to establish the will against the heir, to produce all the subscribing witnesses, if they may be had, that the heir may have an opportunity of cross-examining them; but where the heir sues to set aside the will, this degree of strictness may, under circumstances, be dispensed with." (2 *Greenl. Ev.* sec. 694, see cases cited there. 2 *Stark. Ev.* 922, 923, and cases cited. 1 *Phill. Ev.* 501.)

The rule in the temporal Courts, then, in proceedings before them, ordinarily is, that no more than one of the subscribing witnesses need be called, if that one is one who can speak to all the circumstances of the attestation.

Proceedings in the temporal Courts in which this rule has

Walker, ex'r, vs. Hunter et al.

place, are proceedings which involve title to *land* claimed under a will, as an issue of *devisavit vel non*, or sometimes an action of ejectment. In such proceedings, the party claiming under the will has to prove the will—probate in the spiritual Courts being only sufficient to prove a will for goods, but not to prove one for lands.

It seems, then, that in England, in the spiritual Courts, as many as two witnesses are necessary to the proof of a will—such a will as those Courts can take cognizance of; that is, one of goods—and in the temporal Courts not more than one witness is commonly necessary to the proof of a will—such a will as those Courts can take cognizance of the proof of; that is, a will of lands.

This being the state of the English law, what is the state of our law?

By our law, the proceeding for probate, whether the will be one of goods or one of lands, or one of both, has to begin in the Court of Ordinary, though it may pass from that Court into higher Courts—the Superior and the Supreme. (3d Art. Con. Ga. Walker's Dig. 415. Prin. Dig. 231.)

Suppose a proceeding before that Court—as there has been in this case for the probate of a will—a will partly of goods and partly of lands—which rule, as to the number of witnesses to be required, is the Court to follow, that of the English spiritual Courts, or that of the English temporal Courts—or is it to follow the rules of both? These are the precise questions now for determination.

The answer to these questions depends on the changes which this State has made in the English law. What, then, are those changes? They are, among others, the abolition, not only of the Ecclesiastical Courts, but of the whole Ecclesiastical establishment; the erection of the Court of Ordinary instead of those Courts; the erection of nothing instead of that establishment, and the adoption of "the Common Laws of England." The Court of Ordinary is a temporal Court, and is subject to the supervision of the Superior Court, and ultimately, to the supervision of this Court—both of which are also temporal.

Walker, ex'r, vs. Hunter *et al.*

Courts—and Courts under the especial government of those “Common Laws of England” adopted by the State as aforesaid.

It seems to this Court a fair inference from all this, that the State intended the abrogation of all those usages and rules of the Ecclesiastical Courts, which were peculiar to those Courts, and which were opposed to the Common Law; and the substitution of the Common Law for those usages and rules—as for example: the abrogation of the usages and rules by which those Courts imposed penances, excommunications and other spiritual punishments—those by which they enforced the payment of tithes and other dues to the clergy—those by which they gave redress for the injuries of spoliation, dilapidation and neglect of repairing the church—those by which they required the depositions of witnesses to be taken down in writing—and those by which they required, for the proof of any fact, the evidence of not less than two witnesses.

This view is confirmed by the want of any attempt, on the part of the Courts of Ordinary or the Superior Courts, when supervising cases, brought up to them from the Court of Ordinary, to exercise or enforce any of those usages or rules. Those Courts, as far as we know, have never required depositions to be taken down in writing, or required the evidence of at least two witnesses to every fact or allegation in a case. In cases of marriage and divorce, which were, before the Revolution, cases of spiritual cognizance, the Superior Courts have never held that, be the circumstances what they may, the evidence of at least two witnesses was essential to the proof of every matter in the cases. On the contrary, these Courts, in practice, have contented themselves with the employment, as to this particular, of the rules of evidence prescribed by the Common Law.

And the view is also confirmed by the absurd, not to say bad consequences which would follow from the adoption of the opposite view—the view that the State did not intend for those spiritual usages and rules to give place to the rules of the Common Law. For in the case supposed, of a will of both lands and chattels seeking probate, if but one witness could be called

Walker, ex'r, vs. Hunter et al.

by reason, say of the death of the other two or more, the Court, governed by those usages and rules, would have to hold the will good as to the lands, but null as to the chattels. And is it to be presumed that the State ever intended a thing, to say the least, so absurd as that?

[1.] Upon the whole, the conclusion to which this Court comes is, that in the probate of wills, the Courts of Ordinary and the Superior Courts are to follow the rules of evidence prescribed by the Common Law and in use in the temporal Courts of England, at the time when Georgia first adopted the Common Law, unless Georgia has since repealed them; and not the rules of evidence then in use in the spiritual Courts of England; and therefore, we think that the Court erred in the charge to the Jury under consideration—a charge which, as we understand it, meant to tell the Jury, that unless the execution of the will was proved by the evidence of at least two witnesses, one speaking to the signing and publishing, and the other to that or to some adminicular circumstances, they could not find the execution of the will proved, whatever they might think of the other evidence in the case.

We do not mean to say, however, that we think the foundation laid for the introduction of secondary evidence of the hand-writing of Lee, one of the subscribing witnesses to the paper propounded as a will, was sufficient.

Nor do we mean to say, that we think less evidence is required, when the proceeding for probate is compelled by the heir, who is adverse to the will, than when the proceeding is the voluntary act of the executor, or a legatee who is friendly to the will.

Another portion of the part of the charge which the Counsel for the plaintiff argue not to be law, is the following: "That a person has not the right, and it is unlawful for him to move a testator to make him his executor or give his goods, when the testator is a person of weak judgment and easy to be persuaded, and the legacy great."

This, although it has the sanction of Swinburne, we cannot admit to be law. It has not the sanction of any other test

Walker, ex'r, vs. Hunter et al.

writer, or of any decision, as far as we know. It is contrary to what was said by LUMPKIN, J. in *Potts et al. vs. House*, (6 Ga. 359.) That is as follows: "With respect to a will alleged to have been obtained by undue influence, I would remark, that it is not unlawful for a person, by honest intercession and persuasion, to procure a will in favor of himself or another; neither is it, to induce the testator, by fair and flattering speeches; for though persuasion may be employed to induce the dispositions in a will, this does not amount to influence in the legal sense." "On this subject as on that, with regard to capacity, no precise and distinct line can be drawn. Suffice it to say, that the influence exercised must be an unlawful importunity, on account of the manner or motive of its exertion, and by reason of which the testator's mind was so embarrassed and restrained in its operation, that he was not master of his own opinions in respect to the disposition of his estate."

This language is very general. It says, that it is *not* "unlawful" for a person, "by honest intercession and persuasion, to procure a will in favor of himself or another." It makes no exception of the case, when the will is procured from a person of "weak judgment." And we think there is no such exception to be made. If the testator "moved" be a person of weak mind, and the legacy he gives great, the effect produced certainly ought, in general, to be a very *strong presumption* that the "moving" was *undue*—was "unlawful"; yet, the presumption ought not to be a conclusive one. For to make it conclusive might be to annul some very proper wills. Suppose that a father, of weak mind, is "moved" by his grown children to make a will, giving to them, in equal shares, all of his property, and appointing one of them the executor—their motive being, the fear that if their father died intestate, none of them could become his administrator, by reason of inability to give securities; and so, the fear that the administration of the estate would pass into the hands of strangers? Ought such a will to be annulled—annulled on the ground that it was simply "unlawful" for the children to "move" the father to make such a

Walker, ex'r, vs. Hunter et al.

will? It ought, if the position of *Swinburne*, adopted by the Court below, be right. But we think it ought not. Other such cases may be supposed.

[2.] In our view then, the charge of the Court ought to be slightly modified, to express the law on this point—modified as follows: That though a person *has* a right, and it is *lawful* for him to move a testator to make him his executor or give his goods, even when the testator is a person of weak judgment and easy to be persuaded, and the legacy great; yet, if, in such case, a person does so move a testator, a very strong presumption arises that the moving is of a sort not right or lawful—a presumption only to be rebutted, as I think, by his bringing forward something sufficient to show the will to be such as a person of average mind, morals and family love might be supposed willing to make.

We agree, then, with the Counsel for the plaintiff, that some part of the charge of the Court did not fully express the law. But we will not undertake to say whether the verdict was or was not contrary to that part of the charge which did express the law, nor whether it is true or not, that the verdict was contrary to law, as in another one of the grounds on which the granting of the new trial was put, it is assumed to have been; and this we will not do for the same reason for which we forebore to express an opinion as to whether the ground, that the verdict was contrary to evidence, was or was not true. To say whether a verdict is contrary to law or not, it is, in general, necessary to say whether it is contrary to evidence or not. And this case is not an exception to that general rule.

[3.] The next of the grounds on which the granting of the new trial was put, that we shall notice, was "the fact that while the cause was pending before the Special Jury, E. H. Crocker, Esq. one of the Counsel for respondent, on the night of the twenty-third March, entertained at his house two of the Special Jury to whom the said cause was submitted, and the respondent, Charles Walker." This is undoubtedly a good ground: It is hardly in the power of affidavits wholly to free this affair from suspicion. It is not in the power of affidavits

Walker, ex'r, vs. Hunter et al.

to show that the two Jurors were not consciously or unconsciously affected by it. In *Walker vs. Walker*, (11 Ga. R. 206,) this Court says: "when a Juror has been impanelled to try a cause, and during the trial and before he has rendered his verdict, he shall be *entertained* by either of the parties, at *their expense*, and the verdict be in favor of the party so entertaining the Juror, the verdict will be set aside." "This rule is indispensably necessary to preserve the purity and integrity of Jury trials in our Courts, and cannot be too strictly enforced."

This is not a case in which we can make a distinction between entertainment of a Juror by the prevailing party, himself, and entertainment by his Counsel.

The next and last of the grounds on which the new trial was granted was, "that the paper in the hand-writing of Lewis Solomon, and found by the Jury in their room, was calculated to mislead the Jury and influence their finding."

The Lewis Solomon referred to was the Ordinary, from whose judgment admitting the will to probate, the case on trial had, by appeal, been brought into the Superior Court. He was also the foreman of the Grand Jury, from which, after the removal of him from it for cause, had been struck the Special Jury trying the case. The paper was found by the Jury in their room, soon after they met in it to consider of their verdict.

Under these circumstances, we think the Court was sufficiently forbearing, when it said that the paper "was calculated to mislead the Jury and influence their finding."

The affidavit of Solomon amounts to this: that he did not intend the paper for the Jury, and that he does not know how it got before the Jury. The affidavit of the foreman of the Jury is, that the paper "was found in the room of the Special Jury;" "that said paper was found shortly after entering their room, before they made up their verdict, and was examined by all of the Jury, as this deponent remembers, before they deliberated on said cause and made up their verdict."

This affair has an ugly look. We think the Court was right

Mitchell vs. Pyron.

in making it a ground for a new trial. (*Coke Litt.* 227, b. 2 *Hale's P. C.* 308. *Metcalf vs. Dean, Cro. Eliz.* 189.)

So, these two grounds for a new trial being sufficient, the Court was right, as we think, in granting a new trial. But nothing whatever is meant to be said, as to whether or not the verdict was contrary to the evidence or to the weight of the evidence.

No. 67.—WILLIAM MITCHELL, plaintiff in error, vs. LEWIS PYRON, defendant in error.

[1.] Service in the Ecclesiastical Courts of England, or the Court of Ordinary in our State, is perfected on kindred and creditors by citation.

[2.] Any creditor thus served, becomes a party to the proceeding, and if he be dissatisfied with the appointment of an administrator by the Ordinary, whether he objects in Court or not, he may appeal within the time prescribed by law.

Motion to dismiss an appeal, in Troup Superior Court. Decision by Judge O. WARNER, August Term, 1854.

William Mitchell applied for and obtained letters of administration on the estate of Jacob Striman, deceased, no objections being made or filed thereto. Within four days, Lewis Pyron, alleging himself to be the principal creditor of Striman, appealed from the order appointing Mitchell, and in the Appellate Court, filed his caveat to the appointment. Counsel for Mitchell moved to dismiss the appeal—

1st. Because Pyron filed no objection in the Ordinary Court.

2d. Because there was no issue in that Court, and Pyron was no party there; and there was no error committed by the Ordinary.

Mitchell *vs.* Pyron.

The Court refused the motion, and this decision is assigned as error.

B. H. HILL; E. Y. HILL; KNIGHT & ADAMS, for plaintiff in error.

O. WARNER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion..

[1.] The same strictness, as to matters of service and pleading, which is required in cases at Common Law, is not observed in the Ecclesiastical Courts or in our Courts of Ordinary, which derives its practice, in this regard, from the Ecclesiastical Courts of England. Accordingly, service is perfected on kindred and creditors, in these Courts, by citation. (1 *Bro. Civ. L.* 453, 454. 4 *Co. 29, a.* 7 *Co. 42, b.* *Bac. Abr. Tit. Ecc. C. (E.) Roll. Abr. S. 30.*)

[2.] It is not denied that the citation in this case was regular. If it were, and Pyron was a creditor, (as is alleged) he was sufficiently served, and must be regarded as a party to the proceeding. That he was a creditor, may be said to be shown by the allegations which were not traversed; and which, for the purposes of this motion to dismiss, must be held to be admitted.

Under these circumstances, he would certainly have been concluded by the appointment, if there had been no appeal. If so, he was a party to the proceeding, whether he made objection to the proceeding before the Ordinary or not, and had a right to appeal, within the time prescribed by law, if dissatisfied with the Ordinary's decision in making the appointment. (1 *Greenl. Ev.* 523.)

Judgment affirmed.

Wright vs. Greenwood & Co.

No. 68.—J. J. WRIGHT, plaintiff in error, vs. W. B. GREENWOOD & Co. defendants in error.

- [1.] Where the verdict of a Jury is not decidedly and strongly against the weight of evidence, it should not be set aside and a new trial granted.
- [2.] A new trial will not be granted on account of newly discovered evidence, which does not tend to prove facts that were not directly in issue on the trial, or were not then known and investigated by proof.

Assumpsit, &c. in Troup Superior Court, and motion for new trial. Decision by Judge O. WARNER, December Term, 1854.

Greenwood & Co. sued James J. Wright on a note for \$816. Wright pleaded that the note was given for the purchase of a negro girl, and that she was unsound in this: that she had white swelling in her left arm, though warranted sound. On the trial, the bill of sale, dated 22d March, 1851, was in evidence; and it was proven by physicians and others, that in the summer and fall of 1852, and in the year 1853, the negro had white swelling in her left arm. There was an old scar on the arm. From this fact and others, two physicians swore they believed the disease had been of "some time" standing; they could not say how long. On the other side, it was proven by neighbors who had known the negro in North Carolina, that she was sound, and did the ordinary work of negroes, up to the time of her sale. A physician there testified, that in 1849, he lance a large boil on her left arm, after which it healed readily; that at first he supposed it to be white swelling; but after its healing so readily, he was satisfied it was not. It was also proven, that twelve months after the sale, Wright "expressed himself" satisfied, and promised to pay the note. This is the substance of the evidence. The Jury found a verdict for Greenwood & Co.

Wright moved for a new trial—1st. Because the verdict was contrary to the evidence. 2d. For newly discovered evidence in this: that he could prove by one William R. Hardy, of Heard County, that the negro was lame and unsound in the

Wright *vs.* Greenwood & Co.

left arm, three days after the sale. This last ground was supported by the affidavit of Hardy stating the fact, and that he had never before communicated it to Wright; and the affidavit of Wright, as to the truth of this ground.

The Court refused the new trial, and this decision is assigned as error.

BULL & FERRELL, for plaintiff in error.

MORGAN, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] We are not prepared to say, that this verdict is contrary to the evidence. At all events, we are satisfied, that it is not so decidedly and strongly against the weight of evidence, as to authorize an interference with the verdict of the Jury.

[2.] The newly discovered testimony, which was presented upon the motion for a new trial, is, in its nature, cumulative evidence—such as had been received already, as to the question, whether or not this slave was diseased with white swelling at the time of her sale to the plaintiff in error (March 1851). That testimony was presumptive, it is true, but so is this; and it goes to the same point. Its tendency is greatly to strengthen that presumption; and it seems very hard that it cannot be received. I confess that I have leaned very much towards receiving it. But we find the rule inflexible, that a new trial will not be granted because of the discovery of *any* evidence, which does not tend to prove facts that were not directly in issue on the trial, or were not then known and investigated by proof. It is impossible for us to say that this fact was not, on the first trial, investigated by proof. (*Grah. N. T. Ch. 13. Moore vs. The Phil. Bank, 5 Serg. & R. 40. Warren vs. Hope, 6 Greenl. 479.*)

The sound reasons on which the rule is based, viz: the necessity that there should be an end to litigation; the encouragement which a different practice would hold out to the

Johnson, adm'r, vs. Worthy.

prolonging of suits, and to the introduction of perjury, for the purpose of presenting new evidence, quite reconciles me to what appears something of a hardship in this particular case.

Judgment affirmed.

No. 69.—WILLIAM JOHNSON, adm'r of Allen Weir, dec'd, plaintiff in error, vs. LEONARD WORTHY, defendant in error.

- [1.] The widow of W. being one of the distributees of his estate, and entitled to a provision for herself and family, for one year, out of the same, is not a competent witness in a case where the administrator is seeking to recover property for the estate. If the estate be insolvent, and she has thus no interest as a distributee; yet, to the other provision she is entitled; and hence, she is interested to increase a fund out of which she may have distribution.
- [2.] A parol rescission or mutual release of a contract in writing and under seal, for the sale of lands, may be admitted as sufficient evidence of such release, if the rescinding contract has been executed.
- [3.] Immaterial and irrelevant testimony should be rejected by the Court.
- [4.] An amendment to a bill which is not material, may be refused by the Chancellor.
- [5.] Where the charge requested is not authorized by the pleadings and the proof, the same may be properly refused.

In Equity, in Pike Superior Court. Tried before Judge STARKE, October Term, 1854.

William Johnson, as the administrator of Allen Weir, deceased, filed a bill against Leonard Worthy, alleging that Worthy had sold certain lands to Weir and given him a bond for titles thereto; that after Weir's death, to defraud his creditors, Worthy obtained possession of the bond and destroyed it, and sold the lands for a largely increased price to some one else; that Weir's estate was insolvent. The prayer was for a

Johnson, adm'r, vs. Worthy.

decree for conveyance, and an account for rents, issues and profits. On the trial, complainant offered in evidence the depositions of Mrs. Weir, the widow, which were rejected by the Court, on the ground of her interest in the estate. This decision was excepted to by complainants.

Defendant's Counsel offered in evidence the depositions of Burrell Orr, who swore that Weir told him, previous to his death, that he had rescinded the trade with Worthy for the land, and that he had the use of it for one year for his improvements. Complainant's Solicitors objected to this testimony, on the ground that a contract under seal could not be rescinded by parol. The Court admitted it in evidence, and this decision was excepted to.

Complainant then offered to prove by Thomas C. Trice, that the land was worth \$2,000, (\$1,000 more than the purchase money) at the time the trade was rescinded, which evidence was rejected by the Court and complainant excepted.

Complainant then amended his bill, and alleged, that shortly after the death of Weir he proposed to pay Worthy the purchase money and take the land for the estate, which Worthy refused to do. The Court refused to compel the defendant to answer this amendment—and this decision was excepted to by complainant.

Complainant requested the Court to charge—"That if Worthy bought this land for Weir and took the deed himself, and gave Weir a bond for titles, in order to secure himself in the purchase—that in Equity, this was a mortgage." The Court refused so to charge, and complainant excepted.

Complainant requested the Court further to charge, "That any contract made between Worthy and Weir, in relation to the land, to be binding, must be in writing, as well to rescind the contract as otherwise." The Court declined so to charge, but charged, that if the Jury believed that the rescinding contract had been executed according to the terms proven, it was not necessary it should be in writing.

This refusal to charge is also excepted to.

Upon these exceptions error is assigned.

Johnson, adm'r. vs. Worthy.

H. & G. J. GREEN; MARTIN, for plaintiff in error.

BORDERS & HARRIS, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The testimony of Mrs. Weir was rejected properly, upon the ground, (if no other) that she was interested to increase the fund out of which she was entitled to a year's support. In the first place, she was a distributee; and thus, interested. If the estate was insolvent, even though the property was not sufficient to constitute a decent and comfortable provision for herself and family; still, she and her family were entitled to a year's maintenance out of it. *Hopkins vs. Long*, (9 Ga. 262.) So that it will be seen, she was directly interested in the result.

[2.] The sale which had been made by the defendant in error, to the intestate of plaintiff in error (Allen Weir) of certain land, and on account of which he gave his bond for titles to Weir, upon payment of the purchase money, was rescinded by verbal agreement between the parties. In view of this, the Court was requested to charge, "That any contract between Worthy and Weir, in relation to the rescission or re-conveyance of said land, must have been in writing to bind the parties, as well as to rescind the said conveyance." This was refused.

It is a well settled rule, that a parol rescission or mutual release of a contract in writing and under seal, for the sale of lands, may be admitted as sufficient evidence of such release, if the rescinding contract has been executed. (1 *Greenl. Ev.* 302. 1 *Phil. Ev.* 565. *Dearbon vs. Cross & Thrasher*, 7 *Cow.* 48.)

Whether or not such agreement to rescind the contract in this case had been executed, was properly submitted to the Jury by the Court.

For the purpose of proving the rescission of the written contract in this case, by parol agreement between the parties thereto, the testimony of Burrell Orr, to which objection has been

Johnson, adm'r, vs. Worthy.

made by the plaintiff in error, was, for the reason just given, properly admitted by the Court.

[8.] Thomas C. Trice was introduced by the plaintiff in error, for the purpose of showing that the land was worth \$2000, or more at the time the contract was rescinded; and his testimony to this effect was rejected by the Court.

There was no allegation by the creditors of Weir, of any fraud on the part of the defendant in error in the final sale of this land; though it is charged in the bill to have been worth more than this sum. But it is difficult to conceive a reason why Worthy should not have sold the land for as much as he could get; and no such reason is suggested. If, then, there was no fraud by him in the sale of the land, and the same were fairly made, there would be no justice in allowing the creditors (if entitled to recover any thing from him by setting aside the rescission of the contract) to recover more than that sum for which, in good faith, he had sold the land. And this seems the more equitable, when it is considered that there is no sufficient or distinct allegation of fraud in the transaction between Weir and Worthy, or committed by Worthy in the rescission.

This testimony of Trice was accordingly not proper or material.

[4.] After the rejection of Trice's testimony, the plaintiff in error moved to amend his bill by adding the statement, that the complainant "proposed to the defendant to pay him the full amount he had paid, with interest, and take the land and administer upon it."

Viewing the circumstances of this case as we do, we are of the opinion that the defendant was under no obligation to accept this proposition. But the conclusive criticism is, that there was no *mutuality* in the arrangement proposed. The plaintiff in error had not administered, but simply proposed to administer, if defendant would give up the land. He had, therefore, no right to contract in the premises, and if not, defendant could not have made any legal and binding agreement with him, and his right could not be affected by a refusal to ac-

Johnson, adm'r, vs. Worthy.

cept his proposition. The amendment was, therefore, wholly immaterial.

[5.] The Court below refused to charge that the complainant was entitled to the relief he sought, because the transaction between Weir and Worthy in the sale of the land and the execution of bond for titles, was in the nature of an equitable mortgage.

In our opinion, taking into consideration the case *as made by this bill*, and the facts which were in evidence, this charge was not authorized. But the Court gave them a charge quite as much, if not more to their interest. This charge was asked with reference to the right of creditors, as presented by the allegations of the bill, to have the value of this land at the time of the rescission (deducting purchase money and expenses) paid to them. And on this head, the Court instructed the Jury, that "parties had not a right to make any contract or agreements to hinder and delay or defraud creditors, either for the benefit of the defendant's family or otherwise." And further, that "if they believed the acts of Allen Weir and the defendant worked an injury to the creditors, it was not necessary to believe it was done with design, in order for the creditors to have relief." This was going very far, indeed, under the facts of this case, and was quite as much in favor of the complainant as he ought to have desired.

The Court further charged, that "if the rescission of the contract and its execution have not been satisfactorily established, you will decree for the complainant the surplus in the defendant's hands, arising from the re-sale of the land to Freeman, after re-imbursering him for all he paid to Roberts, with interest."

Looking to the allegations of this bill, and taking into consideration the proof, if there had been no rescission of the contract, unless the defendant acted fraudulently in disposing of the land to Freeman, he should not have been held liable for more than the amount which the Court here authorizes the Jury to find, whether the transaction was regarded as an equitable mortgage or not. So that the rights of complainant

Wade et al. trustees, vs. Russell.

could not have been legally any more favored by the charge, as requested, than as given.

Judgment affirmed.

No. 70.—JAMES A. WADE and others, trustees in error, vs. JAMES A. RUSSELL, defendant.

[1.] To defeat the marital right, the intention to create a separate estate in the wife must be unequivocal.

Trover, in Troup Superior Court. Decided by Judge WARNER, November Term, 1854.

This case turned on the construction of the following clauses in the will of Hudson Wade, deceased:

“It is my will, that my whole estate be kept together in common stock, for the benefit of my family; and as my children arrive at the age of twenty-one years or marry, they are to receive the sum of Five Thousand Dollars, each, in money or property, at the discretion of my executor—the portions of my daughters, Mary Jane, Sarah Louisa, Julia Elvira and Susan Hudson, I do give to John W. Porter, James A. Wade and William F. Wade, in trust, for the use, benefit and behoof of my said daughters.”

Item: “When my youngest child shall arrive at the age of twenty-one or marry, the remainder of my estate, after each child has received Five Thousand Dollars as aforesaid, shall be equally divided among all my children (naming them); the shares of my aforesaid daughters I give to the trustees aforesaid, for the use and benefit of my said daughters.” The defendant married Mary Jane Wade, and her share of the pro-

Gilmer, assignee, *et al.*, vs. Warren & Scarborough.

erty was given into his possession, where it had remained ever since; and this action was brought by the trustees named in the will, to recover the possession of the negro property from him. The Court held, that they could not recover and non-suited the plaintiffs; and on this decision, error is assigned.

DOUGHERTY, for plaintiff in error.

WARNER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Whatever kind of estate it was, which the testator *intended* to create in the daughters, he intended to create it in them, whether they ever married or not. This is clear. And therefore, it cannot be said, that he intended only a *separate* estate in them. Such an estate could only exist in them, in case they married. Indeed, the words of the will are as suitable to the creation of estates in *sons* as in daughters.

[1.] And it is well settled, that to defeat the marital right, the *intention* to create a separate estate in the wife must be unequivocal. (*Hill on Trustees*, 421.) And in this, the intention to create a separate estate cannot be said to be unequivocal.

So we think the non-suit should not be disturbed.

No. 71.—JOHN H. GILMER, assignee, *et al.* plaintiffs in error,
vs. WARREN & SCARBOROUGH, defendants.

[1.] The Act of 1850, authorizing the Superior Court to make a final ~~decision~~ ^{decree} on *certioraries*, without sending them back with instructions, as was before practiced, does not apply to *certioraries* from the inferior courts.

Gilmer, assignee, *et al. vs. Warren & Scarborough.*

[2.] The direction to pay over money raised by process of garnishment, to judgments or executions against the debtor, according to the priority of their respective liens as established by law, will be observed and enforced by the Courts, so long as the fund is in the hands of the Court or its officer, and not actually paid out.

Certiorari, from Crawford Superior Court. Decision by Judge POWERS.

Warren & Scarborough, holding a *fi. fa.* from the Inferior Court against John S. Johnson, caused a summons of garnishment to be issued to Holmes Steele, who, in his answer, admitted that he was indebted to defendant One Hundred and Twenty Dollars: whereupon, at the May Term, 1850, of said Inferior Court of Crawford County, an order was passed and entered on the minutes, that the garnishee, within ninety days, pay the money to the Clerk, and that the Clerk pay it over to the plaintiffs in *fi. fa.*

At May Term, 1851, the money being in the hands of the Deputy Sheriff, John H. Gilmer, as assignee of a *fi. fa. vs. Johnson*, older than the *fi. fa.* of Warren & Scarborough, and which was in the Sheriff's hands at the time of granting said order, moved a rule to set aside said order and pay the money to said older *fi. fa.* Warren & Scarborough tendered an issue, alleging that said oldest *fi. fa.* had been paid off, and was fraudulently and collusively kept open. Issue was joined, and Counsel for Warren & Scarborough moved a continuance on the ground that he had never before seen said *fi. fa.* and had relied on the order of the Court, passed at May Term, 1850, and was, in consequence, not prepared with testimony to sustain the issue he had tendered. The continuance was refused by the Court; and the affirmants in the issue offering no testimony, the Court granted the rule setting aside the former order, and ordering the money to be paid to the older *fi. fa.*

On certiorari to the Superior Court, the Judge held, that there was no sufficient ground to set aside the former order of the Court, and sustained the certiorari and ordered the money

Gilmer, assignee, *et al.* v. Warren & Scarborough.

to be paid to the *f. fa.* of Warren & Scarborough ; and on this decision error is assigned.

COOK & MONTFORT, for plaintiff in error.

HUNTER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

What is the true construction of the agreement entered into between the Counsel of the respective parties in this case ?

When the last judgment of the Inferior Court of Crawford County was rendered in favor of Gilmer, against Warren & Scarborough, to save the latter the trouble and expense of filing exceptions to the decision and suing out a *certiorari* to procure its reversal, it was stipulated that the case might be carried up to the Superior Court, as though the regular course pointed out by law were pursued.

Upon whom, then, did the burden of proof rest, to set aside this judgment ? Certainly upon Warren & Scarborough. Being rendered by a Court of competent jurisdiction, it is presumed to be right, until the contrary is made to appear. Had a *certiorari* been prosecuted, in response to the mandate of the Court awarding it, all the evidence upon which the Inferior Court acted would have been sent up. The agreement prevented this. And yet, the Circuit Court not only presumed against the judgment of the Inferior Court, in the absence of all proof impeaching it ; but went further, and refused to allow the party in whose favor the judgment was rendered, to support it by evidence.

Indeed, the Court took this view of the whole case, and put its decision distinctly upon it, viz : that the first order passed in favor of Warren & Scarborough, fixed, conclusively, the rights of the litigating parties ; and that it was not competent for the Inferior Court, subsequently, upon any testimony whatever, to annul this first order. And the Judge directed the Inferior Court to pay out the money accordingly.

Gilmer, assignee, *et al. vs. Warren & Scarborough.*

[1.] We would remark, in passing, that the Superior Court has no power to render a final judgment upon *certioraries* from the Inferior Court. The Act of 1850, (*Cobb's Dig.* 529,) extends only to *certioraries* from Justice's Courts.

[2.] But were the rights of Gilmer concluded by the first judgment? So far from it, we hold they were not at all affected by it. The garnishee, Steele, deposed at the May Term, 1850, of the Court. At that term, and before the money admitted by the garnishee to be due was paid into Court, a prospective order was taken, requiring it to be paid over to the Clerk; and by him to Col. Hunter, the Attorney of Warren & Scarborough, within three months. At the time the order was taken, the older *fi. fa.* of Gilmer was in the hands of Hicks, the Deputy Sheriff, and placed there to claim this fund. And the complaint is, that it was fraudulently withheld by some collusive arrangement between Col. Hunter and the Sheriff. Twelve months thereafter, to-wit: at the May Term, 1851, of the Inferior Court, the money, for some reason or other, not having been paid out, but still in the hands of the Court or its officer; Gilmer comes forward and moves the Court to have it applied to his prior lien; and the Court, setting aside its former order as having been improvidently granted, directs the fund to be paid to Gilmer.

It is not pretended that Gilmer was a party to the first order. The burden of his complaint is, that he had no notice of it; that his *fi. fa.* was withheld. His rights then, so far from being fixed, were not and could not have been prejudiced in the least by that order. He finding a fund in Court, then, raised by process of garnishment, comes forward, and planting himself upon his Statutory preference, (See *Cobb's Dig.* 78,) claims, as he had a right to do, under the law, to have the money appropriated to his demand. And why was he not entitled to it? What was it to him, whether the first order was fairly or fraudulently obtained?

The regularity of the Gilmer execution is attacked. The Circuit Court did not adjudge this point; hence, we are not called upon to do so. We have inspected the record from Lee

Miller, garnishee, *et al.* vs. Conklin & Co. *et al.*

County, however, upon which this precept issued, and see nothing in it which would authorize this or any other Court to vacate the proceeding. It is not true, in point of fact, that the judgment of Warren & Scarborough is against John S. Johnson individually, while the judgment in favor of Gilmer, as assignee, is against him representatively. Both judgments are against John S. Johnson, individually. There are two Johnsons—one John S. and the other John Johnson. Not only is John S. Johnson a defendant in the Gilmer judgment, but Oglesby & Jackson, as the administrators of John Johnson, deceased, are also co-defendants. But the two Johnsons are wholly distinct persons; and we repeat, John S. Johnson, individually, is a judgment debtor in both. And while there may be some irregularity in the proceedings, they are clearly amendable; and the defects, such as they may be, are not such as to warrant the Court in setting aside or postponing this older lien.

No. 72.—S. F. MILLER, garnishee, *et al.* plaintiffs in error, *vs.*
CONKLIN & CO. and others, defendants.

[1.] An assignment by a firm in insolvent circumstances, of all [their assets, for the use and benefit of such creditors as should, within ninety days, file their claims with the assignee and release the said firm from all liability therefor, is illegal and void as against objecting creditors, in the State of Georgia.

Garnishment, in Macon Superior Court. Decided by Judge POWERS, September Term, 1854.

This was a garnishment issued to S. F. Miller as garnishee, on a judgment of Conklin & Co. *vs.* Collins, Ashburn, McKenzie & Co. The garnishee returned that he had no effects, stating that he had received from defendants certain assets under

Miller, garnishee, et al. vs. Conklin & Co. et al.

a deed of assignment, for the benefit of creditors. This deed, dated Dec. 28th, 1852, transferred to Miller all the assets of Collins, Ashburn, McKenzie & Co. for the use and benefit of all such of their creditors as should, within ninety days, file their claims with the assignee, and release the said firm from all liability therefor; said assignee then to collect the assets and divide the same equally, *pro rata*, among the creditors according to the arrangement. The assignors relinquished all claim to or interest in said assets, and authorized the assignee to use their names for the purpose of collections. The garnishee also excepted to the jurisdiction of the Court over the case, on the ground that the matter was properly cognizable in Equity, and was not a subject for process of garnishment.

The amount in the hands of the garnishee, collected under this assignment, was admitted. The Court over-ruled the points made in the answer, held the assignment void, and gave judgment against the garnishee, to be paid in three months. And on this decision error is assigned.

MILLER & HALL, for plaintiffs in error.

COOK & MONTFORT, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The point now presented has never been expressly adjudicated in this State.

In England, where legal policy permits and encourages bankrupt laws, assignments with conditions of release are upheld by the Courts.

We find a considerable conflict of opinions on the subject, when we look to the decisions in the United States. In some, such assignments are supported; but in the majority, where the question has been made, they have been held illegal. Where they have been sustained, it will be found, we think, that the first decisions on the subject were made in the earlier days of the Republic, when our policy, legal and commercial,

Miller, garnishee, et al. vs. Conklin & Co. et al.

had but slightly diverged from that of Great Britain. This seems to be true of Virginia, Pennsylvania and South Carolina. (*1 Amer. Lead. Cas.* 83.) It is also true of Massachusetts, we believe. (*Id.* 84.)

The case of *Bromshear vs. West*, (7 Pet. 609) which was a decision by Chief J. Marshall, sustains the same doctrine. But it is put upon the authority of the Pennsylvania decisions, (being made in a Pennsylvania case) and that distinguished person, in making the decision, expresses "doubt and regret," and condemns the morality of such a transaction.

So in *Halsey et al. vs. Whitney*, (4 Mass. 207, 227, 230) such an assignment was supported by Mr. Justice Story, upon "the supposed opinions of the profession in Massachusetts": but he, too, condemns the principle on which it is based.

In the State of Alabama, it was decided (two Judges dissenting) in an early case, that such an assignment was valid; but we are told, that that decision has been reluctantly adhered to on the ground of mere authority. (*1 Amer. L. C.* 84.)

A different rule prevails in New York, Connecticut, Ohio, Illinois, Missouri, Mississippi and North Carolina. And in Maine and New Hampshire, Statutes have been passed for the purpose of requiring equality of distribution among creditors.

Now, if unassisted by our own legislation, and left to decide between these conflicting views of Courts, we think we should not have much difficulty in arriving at a satisfactory conclusion. In our opinion, the arrangement gives to the debtor an advantage which is not consistent with a pure morality or accurate justice—an advantage which enables him, in the language of Judge Sutherland, in *Grover vs. Wakeman* (11 Wend. 209), "to operate upon the fears of his creditors and coerce them into his own terms." It proceeds, in short, on principles which have been condemned by such men as *Marshall*, and *Story*, and *Kent*, even while the two first have been compelled to sustain such an assignment in particular cases, by reason of precedent applicable to these cases.

We have no such precedent in our State, and are free to adopt that which we deem the more wholesome rule, if we can.

Miller, garnishee, et al. vs. Conklin & Co. et al.

compelled to choose between these conflicting views of Courts, and to determine the question upon principle alone.

Some of the cases which maintain the legality and propriety of such an assignment, have gone upon the idea that the debtor has the right, *bona fide*, to prefer one or more of his creditors, and pay the debts due to them with his property. On this principle Ch. Johnson (Job Johnson) of South Carolina, puts the case in *Nialan vs. Douglass*, (2 Hill Ch. R. 451) perhaps as strongly as it can be found elsewhere. He sets out by granting the debtor's right to prefer one creditor over another, and says, "then if it would have been no fraud on him" (the creditor) "to prefer others over him with or without conditions, is he defrauded by giving him an opportunity to participate with them? an opportunity which it would have not been fraudulent in Johnson" (the assignor) "to have withheld from him?"

This is the whole strength of the argument. To our minds, it is not satisfactory. The law gives to the creditor the right to prefer, necessarily. And this is advantage enough. Our Statute of 1818, sanctions this right expressly. Let him use this advantage, and prefer any creditor he pleases, and pay away his property to such creditor, as he has the right to do in good faith. But let him not use the threat of doing this, as a sort of *moral duress*, by which he may coerce his creditors into an agreement which they would not otherwise approve. Lead him not the hand and the strong arm of the law in doing this.

So that, if there were nothing else to aid us in taking sides on this question, (so much mooted in this country,) whether or not such an assignment was of a character "to hinder and delay creditors;" therefore, as contrary to the 13 of Elizabeth, void and illegal in our State, these considerations would influence and control our views on this subject.

But there is something else; and that, in our opinion, is the stress of our own legislation. We not only have no bankrupt laws, but our policy and the public sentiment of our people are opposed to them. And what is such an assignment but a

Miller, garnishee, et al. vs. Conklin & Co. et al.

private Bankrupt Law? a Bankrupt Law executed by the debtor for his own benefit! Does he not thus release himself from his debts, by compelling his creditors to take what he can pay?

Our Statute of 1818, if not in express terms, or by necessary implication, yet, in its whole scope, purpose and spirit, prohibits such an assignment. Like the Statutes of Maine and New Hampshire, it was intended to ensure "equality of distribution among creditors;" for it declares the assignment void, if "any creditor shall or may be excluded from an equal share of the estate so assigned," &c. And a *proviso* declares, that nothing contained in this Act shall prevent any person from selling or disposing of any part or the whole of his, her or their estate, so the same be free from any trust for the benefit of the seller, or any person appointed by him." Thus affording a key to the mind of the Legislature, and indicating how they intended this equal distribution to be made, viz: on such terms as should be free from any *trust for the debtor's benefit*. But is an assignment with condition of release, such a disposition of the property as is without a trust for the debtor's benefit? If not, it is contrary to the scope and spirit of this Statute, if not to its letter.

Our Legislature has also manifested its abhorrence of unequal assignments, by its penal provisions (treating the same as a felony) against insolvent banks making assignments in contemplation of insolvency, which are not for the benefit of all the creditors and stockholders.

Of course this decision goes no further than the case made. We do not undertake to say that such an assignment would not be binding on the creditors, if they were all to accept, and no one was injured by it; nor as between the parties, the debtor and the assignee.

Judgment affirmed.

Causey & Oslin *vs.* Miller.

No. 73.—CAUSEY & OSLIN, plaintiffs in error, *vs.* JAMES. A. . .
MILLER, defendant.

[1.] If the verdict be right, a new trial will not be granted by the Supreme Court for mistakes made by the lower Court, on the ground of such mistakes, unless a motion was made, in that Court, for a new trial, on the ground of such mistakes.

Assumpsit, from Crawford Superior Court. Tried before Judge POWERS, September Term, 1854.

This was an action on a promissory note of Causey & Oslin, sued on by Miller.

The defence was set up by Oslin, and was, that after the firm of Causey & Oslin had been dissolved, that Causey, one of the firm, sent a clerk to Miller with the sum of One Thousand Dollars, (nearly enough to pay the note) of the funds of the partnership, with instructions to pay it to Miller, if required, but to request him to wait, and to allow the money to be applied to other debts ; that on this request Miller consented to wait, and the money was paid to other debts, some of Causey & Oslin, and some of Causey alone. A short time afterwards Causey failed.

The defendant, Oslin, insisted, that by allowing the funds thus sent to pay his note, to be applied to other debts, Miller had lost his right to hold him, Oslin, liable on the note.

The Court over-ruled the defence, holding, that unless the money had been Oslin's private funds, and so known to Miller, the indulgence given could not destroy Miller's right to recover against the partnership.

To this decision defendants excepted.

MILLER & HALL, for plaintiffs in error.

NORMAN, for defendant in error.

Causey & Oslin vs. Miller.

By the Court.—BENNING, J. delivering the opinion.

In this case, the verdict could not, on *the evidence*, have been other than what it was. There was no evidence, that Miller, when he consented that the \$1000 might be applied to the payment of other debts than his own, had knowledge or notice, that the partnership of Causey & Oslin had been dissolved, or that the \$1000 was to be applied to the payment of any other debts than those of Causey & Oslin. There is, therefore, no evidence that he consented to the *misapplication*, by Causey, of any funds, whether belonging to Causey & Oslin or to Causey, or to Oslin. For aught that appears in the evidence, the consent of Miller was to no more than that the fund might be applied to the payment of other debts due by Causey & Oslin. Such a consent as that could not, if acted on by Causey, injure Oslin. Such a consent could not, therefore, operate so as to discharge Oslin from the debt to Miller. Nothing but a consent to a misapplication of the money could. And the burden of showing consent to a misapplication was upon Oslin.

[1.] This being so, and there not having been made any motion in the Court below for a new trial in the case, this Court ought not to order a new trial in it, even if it should consider the Court below to have committed some errors; for in such a case, a new trial could not properly result in any other than the old verdict.

No opinion, however, is expressed as to whether the Court erred in any respect or not. (*Acts of 1853-'4-'46.*)

A new trial is refused simply because the verdict was beyond a doubt, right on the evidence.

Cooper *vs.* The State.

No. 74.—LEROY W. COOPER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] The *scire facias* against the bail in an indictment, is to be issued from the Court of the county in which Court is the indictment, and not from the Court of the county in which reside the bail.

Ca. sa. and illegality, from Pike Superior Court. Decided by Judge STARKE, October Term, 1854.

Samuel Moore being indicted in the County of Pike, gave bond for his appearance, with Leroy W. Cooper as security, dated December 20th, 1850. The defendant failing to appear at April Term, 1852, (*scire facias* having previously issued,) judgment was entered against Cooper alone, for the penalty of the bond. A *fi. fa.* was issued and returned *nulla bona*, and then this *ca. sa.* was issued on said judgment, and the defendant was arrested in Spalding County. Cooper made his *affidavit* of illegality to said *ca. sa.* on the grounds—

1st. That the judgment was void, as being against only one of the parties to the bond.

2d. That there was no reference, in the *ca. sa.* to the fact that a *fi. fa.* had been previously issued.

3d. That the *ca. sa.* being issued from the Superior Court of Pike County, and the defendant residing in Spalding, it was necessary that a return of *non est inventus* be made by the Sheriff of Pike, before the *ca. sa.* could have been executed in Spalding.

4th. Because, between the giving the bond and the rendition of judgment thereon, the County of Spalding was created by law, and the defendant was and had been within the limits of the new county, and that the Superior Court of Pike County had, by the terms of the said Act, no power to render said judgment. The Court over-ruled all the grounds taken, and on this decision error is assigned.

MCCUNE, for plaintiff in error.

Sol. Gen'l THRASHER, for defendant.

Cooper *vs.* The State.

By the Court.—BENNING, J. delivering the opinion.

[1.] The *scire facias* on a forfeited bail bond, in an indictment, has to issue from the Court in which is the indictment. (*Cobb's Dig.* 861, 862.)

The indictment in this case was, to a certainty, *at first*, in the Court of Pike Co. The Court of that county was the one in which the indictment was made. And whether the indictment ever got out of that Court into the Court in Spalding, does not appear; for it does not appear whether the offence charged in the indictment was committed in that part of Pike which was afterwards converted into Spalding, or in that part which was allowed to remain Pike.

For aught that appears, then, the indictment still remained in the Court in Pike County, notwithstanding the Act of the Legislature, which, out of a part of Pike County and parts of other counties, made Spalding.

This being so, for aught that appears, the Court in Pike was the Court from which the *scire facias* against the bail had to be issued. And unless something appeared going to show that the Court in Pike had ceased to be such Court, it is not to be presumed that it had ceased to be such.

There is, therefore, no foundation, *in fact*, for the ground of the affidavit of illegality, to the effect that the *ca. et al.* should have issued from the Court in Spalding, and not from the Court in Pike.

The Act of 1851-'2 seems, indeed, not to have provided for the transfer of criminal cases, but only of civil. (*Acts*, 60.)

Of the other grounds contained in the affidavit of illegality, none were insisted on in the argument before this Court.

The judgment of the Court below, over-ruling the affidavit of illegality, ought therefore to be affirmed.

Dacy vs. The State.

No. 75.—CHARLES DACY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

- [1.] It is no ground for a continuance, that the defendant expects to prove an *alibi* by an absent witness, on the day alleged in the indictment, provided the Solicitor General will waive proving the offence on that day.
- [2.] Though the allegation of time is important, it is in no case necessary to prove the precise day or even year laid in the indictment, except where a day is averred by way of describing a written instrument, record, &c. or where time enters into the nature of the offence.
- [3.] Diligence is required of parties and their Counsel in the preparation of causes; and Courts are disinclined to disturb verdicts occasioned by negligence; yet, where justice demands it, it will be done.
- [4.] D being prosecuted for a misdemeanor, pleaded a former acquittal, and applied to the Clerk for the former indictment preferred for the same offence and the order on the minutes of the Court discharging the accused from the prosecution: neither of which could be found. The Court having directed the trial to proceed, there was a verdict of guilty rendered against the defendant. In the meantime, the search having been continued, while the Jury were out, both the indictment and the order of discharge were found, the former in the possession of the Solicitor General, who had overlooked it in the hurried examination which he made amongst his papers. There being no doubt from the evidence and a comparison of the pleadings that the offences were the same: *Held*, that under the circumstances, a new trial should have been granted.

Indictment for misdemeanor, in Bibb Superior Court.
Tried before Judge POWERS, November Term, 1854.

This was an indictment for receiving corn from a slave, charged in the indictment to have been committed on the 1st May, 1852.

When the case was called for trial, defendant moved a continuance, on the ground of the absence of certain witnesses, by whom he expected to prove an *alibi* on the day named in the indictment. The Sol. Gen'l. stating, that he did not expect to prove the offence on that day, the Court refused the continuance; and this decision is assigned as error. The defendant's Counsel then asked for time to plead a former acquittal; and took some half hour to look for the record, but being unable to find it, and the

Dacy *vs.* The State.

Sol. Gen'l having examined his papers, into whose custody the indictment was traced, and not finding the former indictment, the Court ordered the trial to proceed, the Counsel for defendant stating in his place, that there was such an indictment and order of acquittal, which could be found, if time were allowed; and this decision is assigned as error.

The State introduced one witness, who proved the receipt of corn from a negro by the defendant, in the early part of May, 1852. The witness did not recollect the day, but said it was not the 1st.

No other testimony was introduced.

The Court charged the Jury, that if they believed, from the evidence, beyond a reasonable doubt, that the defendant received corn from a negro, without written permission from those authorized to give it, at any time within two years before the finding of this presentment, that they should find the defendant guilty.

The defendant had previously moved for an acquittal, on the ground that the offence was not proved on the day charged, which the Court refused; and on this decision, as well as on the charge, error is assigned.

The Jury returned a verdict of guilty.

Afterwards, the defendant's Counsel moved in arrest of judgment, and for a new trial, and produced an order of Court, granted at May Term, 1853, granting an acquittal to the defendant, predicated on two successive demands for trial under the Penal Code. He produced also the bill of indictment, on which said order was granted, (which was found among the Sol. Gen'l's papers) and which was word for word with the present indictment, except that the other charged the offence on the 1st June, 1852, and that in the description of the slave, between the words "a certain negro man slave" and "of yellow complexion," there were, in the other indictment, the words, "a wagoner," which are not in the present indictment. The Court refused the motions, holding the proof of identity in the offences charged in the two indictments was not sufficient.

Dacy *vs.* The State.

and sentenced the defendant to thirty day's imprisonment, and payment of costs.

To which refusal and sentence, the defendant excepts, and error is assigned thereon, as well as on the other points above noticed.

L. N. WHITTLE, for plaintiff.

Sol. Gen'l DEGRAFFENREID, for the State.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The Court was right in refusing to continue the case. The defendant proposed to prove an *alibi* by the witnesses who were absent; that is, that on the 1st day of May, 1852, the time stated in the presentment, when the offence was committed, he was absent from home during the whole day. To this, the Solicitor General replied, that he did not expect to show that the misdemeanor was committed on the 1st, but on a subsequent day in May.

[2.] This he was entitled to do, as the time need not be proved as laid, unless where it is of the essence of the offence. And the facts may be proved to have occurred on any other day previous to the preferring of the indictment. The authorities are not only uniform in support of this doctrine, but it has been the constant course of proceeding in criminal prosecutions, from the highest offence to the lowest. All objections to this practice on behalf of prisoners have been repeatedly and uniformly over-ruled. (2 *Hawks P. C.* b. 2 ch. 46; 2 *Just.* 218; 3 *Ib.* 230; 1 *Hale's P. C.* 361; 2 *Ib.* 179; *Fost.* 7, 8; 1 *Chitty's Crim. Law*, 223; *McNally's Ev.* 496-7, *et seq.*; 4 *Starkie's Ev.* 1568; *Starkie's Crim. Pl.* 58; 2 *Stark. Nisi P.* 458; 1 *Phil. Ev.* 208, 514; *St. Trials*, 587, 605, 542, 552; *Rex. vs. Channock, Holt*, 301; 1 *Salk.* 288; *The State vs. Hanney*, 1 *Hawks. R.* 460; *Com. vs. Hooring-ton*, 3 *Pick.* 26; 9 *Cowen* 655; 2 *Mason*, 49.)

Dacy vs. The State.

But where the date of a particular fact is necessary to ascertain, with precision, the offence charged, it must be proved as alleged. Consequently, several exceptions have been made to the foregoing rule, namely: that it will not be necessary to prove precisely the time as laid. 1st. In all cases where written instruments are pleaded, the date, if stated, must correspond with the date of the instrument when produced in evidence on the trial. (*Com. vs. Lyon*, 2 *Camp.* 307, *n.* *Freeman vs. Jacob*, 4 *Campb.* 249.) 2d. As deeds may be pleaded, either according to the date which they bear, or to the day on which they are delivered—if a deed produced in evidence bear date on a different day from that stated in the pleading, the party producing it must prove that it was, in fact, delivered on the day alleged in the pleading. 3dly. If any time stated in the pleading is to be proved by matter of record, it must be correctly stated. (1 *T. R.* 656. 4 *Id.* 590. 11 *East.* 508. 1 *H. B. L.* 49. 2 *Saund.* 291, *b.*) The slightest variance in any of these respects, will be fatal in *felonies*. In *misdemeanors*, in some cases, they are amendable at the trial. 4thly. When the precise date of any fact is necessary to ascertain and determine, with precision, the offence charged or the matter alleged, in excuse or justification, any variance between the pleading and evidence will be fatal. And *lastly*. Where time is of the essence of the offence, as in burglary and the like, the offence must be proved to have been committed in the night-time, although the day on which the offence is charged to have been committed is immaterial. In *murder*, also, the death must be proved to have taken place within a year and a day from the time the stroke was given. (2 *Hawkin's Ch.* 23, §90.)

Of course, then, this waiver on the part of the State, destroyed the materiality of the testimony. Indeed, it rendered it wholly inapplicable to the case. Nor was it forcing a trial by making admissions which cannot be done in civil suits. But it is like striking out a count in a writ or an indictment, to which, alone, the absent proof referred.

[8.] We are unanimous, however, that a new trial should

Dacy vs. The State.

have been granted, after the indictment in the former case was found in the possession of the *Solicitor General*, and the order of discharge and acquittal upon the *minutes of the Court*.

In view of the incalculable importance of time to the Courts, and the unparalleled exigencies of this busy-working age, when the habit of wine-bibbing even is discontinued, not so much from any moral conviction as to its danger or inutility, as from the simple fact, that men cannot afford, as formerly, "to tarry lang at the table!" I repeat, that in view of all this, we may concede, perhaps, that some degree of *laches* was imputable to the party. We are called upon by Counsel to rebuke, indignant, the idea, that the profession are to become absolute drudges in hunting up papers belonging to the offices, &c. Let such appeals be addressed to those who lounge in castles of indolence. We confess ourselves incapable of appreciating them. *Every body must learn to labor.* This is the fundamental law of the universe.

—“Nought is sleeping,
From the worm of painful creeping
To the cherub on the throne.”

It is true, that our sturdy ancestors held it beneath the condition of a freeman to appear at the return day of the writ, or to do any other act at the precise time appointed. (3 Black. Com. 278.) But those good old days of ease and indulgence are gone forever. And it is a vain struggle to attempt to retain or revive them.

[4.] Conceding, as we do then, that Courts are and should be disinclined to relieve against verdicts occasioned by the negligence of parties; still, where justice imperatively demands it, it will be done. No earthly doubt exists but that the defendant has been convicted and sentenced to a month's imprisonment in the common jail of the county, for an offence from which he had been fully acquitted and discharged. Negligence or no negligence, can justice demand such, the sacrifice of the liberty of a citizen, in order to preserve a rule? We cannot sanction such a doctrine, especially as the State was not without fault in this matter. Had the books of the Clerk been

Pryor and Pennington, caveators, vs. Coggin and McRory, propounders.

paged and indexed as they should have been, the order on the minutes could have been referred to instantly. And, then again, the indictment in the former case, was found in the possession of the Solicitor General, who, when applied to, as the record states, *before* the trial, denied having it, having overlooked it in the hurried examination of his papers.

Under all the circumstances, odious as the crime may be for which Daoy has been convicted, and notwithstanding he escaped through a loop in the Statute, without having been tried upon the merits; still, shielded as he is under the immunity of the laws of the land, the judgment against him must be reversed and a new trial awarded.

No. 76.—JOHN PRYOR and WILLIAM PENNINGTON, caveators, plaintiffs in error, vs. MATTHEW COGGIN and ROBERT McRORY, propounders of the will of John Coggin, deceased, defendants in error.

[1.] It is the duty of the Judge to charge the Jury on all the material points submitted in a case and sustained by testimony, whether he be requested to do so in writing or not.

Caveat to the last will and testament of John Coggin, from the Superior Court of Pike County. Tried before Judge STARKE, October Term, 1854.

In June, 1852, John Coggin made this will, and afterwards died. On the trial, it appeared that he was at the time upwards of seventy years of age. The witnesses to the will testified, that in their opinion he was of sound and disposing mind and memory; or at least, was competent to make a will; and that he did so freely and voluntarily.

Fryor and Pennington, caveators, vs. Coggin and McRory, propounders.

It also appeared that the will was written by McRory, his son-in-law, and who was one of the favored legatees under the will. Several other witnesses gave it as their opinion, that testator was competent to make a will, and several testified that they did not consider him competent.

Thomas Trice testified, that the testator exhibited to witness the paper propounded, and also another, and asked witness to read them; and several times, during the reading and before and afterwards, expressed himself dissatisfied with both. He asked witness to write him a will. He frequently asked witness to write him a will; and after the paper propounded was executed, saying he had no will. On one occasion, witness was at testator's house, and Matthew Coggin was present; and testator, several times, asked Matthew for his will, and that he wanted witness to do that writing. Matthew gave the old man an old letter, and when asked by the witness why he did so, he replied that he did it to satisfy the old man. His mind soon became indolent or forgetful.

After the argument, the Counsel for the caveators requested the Court to charge the Jury, that "if the testator was dissatisfied with his will, and was deceived, by having a letter handed to him in place of it, that this, taken in connection with the fact that he never mentioned having a will after it was read to him by Trice, and spoke as though he had no will, amounts, in law, to a revocation of the will." The Court refused so to charge, but charged the Jury, that expressions of dissatisfaction with the will, and repeated expressions of a desire to make another will, did not amount to a revocation.

Counsel for caveators requested the Court to charge the Jury, "that if the testator was dissatisfied with his will; and that being an old man and nearly blind, he called for his will, and was deceived by a party interested in the will giving him another paper, that this amounted to such a fraud as would authorize the Jury to set aside the will;" and this, also, the Court refused to charge.

The Court below also charged the Jury, that the will was not absolutely void because it was drawn by McRory, whose

Pryor and Pennington, caveators, *vs.* Coggin and McRory, propounders.

wife was a principal legatee therein; but that if it was drawn by McRory, and he was a principal legatee, and the testator's capacity, at the time, was at *all doubtful*, then the Jury might set aside the will on that ground, alone, unless they were satisfied, from the evidence, that the testator knew the contents of the will when he executed it; but that this rule did not apply unless, in their opinion, the testamentary capacity of the testator was doubtful.

The Court also charged the Jury, that undue influence, to vitiate a will, must amount to moral *coercion*—must destroy the free agency of the testator; that incapacity before the will was made, amounted to nothing, if he was of sound and disposing mind at the time; that it matters not how capricious the will was—how unequally it divided the property of testator among his children; or even if it gave all to a stranger; yet, if he had testable capacity at the time—understood the contents of the will, and executed it voluntarily, no Court on earth could set it aside or disturb its provisions.

The Jury returned a verdict sustaining the will; and these charges and refusals to charge, are now brought up for review.

McCUNE, for plaintiff in error.

GIBSON, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The alleged error upon which we find it our duty chiefly to observe in this case is, the refusal of the Court below to instruct the Jury that if when he asked for his will the testator were deceived by Matthew Coggin's handing to him another paper in lieu thereof, which he destroyed, &c. this amounts to a legal revocation.

It is true, that the request was not made in writing; and it is also true that the Judge did not, in so many words, refuse to charge; but he omitted or failed to give such instruction. And the question is raised, whether or not he should have done

Pryor and Pennington, *caveators*, vs. Coggin and McBory, *propounders*.

this, under the circumstances and in consideration of the facts in evidence.

His Honor, the Judge, certifies that no request was made to him in writing. That intelligent Magistrate cannot mean to intimate thereby, that as a consequence, he was under no obligation to notice the subject, if the request were preferred or the point made by the Counsel verbally, and was material to a right understanding of the case by the Jury. No one knows better than he, that in such case, it is the duty of the Judge to give instruction upon the point, whether it be presented in writing or not, if it be properly submitted, and in time.

Such a point was presented in this case. If it were true that during the last few days of his life, when he was ill in bed, the testator (knowing what he was saying and doing—and whether he did or not was for the Jury to decide) had asked for his will with an intention to destroy it, or have it destroyed, and another paper was given to him as said will, which he did destroy or have destroyed, then this is a point very material indeed to be considered before this will can be admitted to probate. If the point were made verbally or in writing, and there were any facts to sustain it, it was the duty of the Judge to have called attention to it. Let us see if there are such facts.

The record shows, that Matthew Coggin, a principal legatee and one of the executors, states that the testator did call for his will, when ill in bed, and at the time just stated, and that he (Matthew) deceived him by giving to him another paper (an old letter) in its stead. It remains only to be shown that that letter was destroyed by the testator, or at his instance.

We are told by Mr. Trice, that a short time previously the testator had expressed dissatisfaction with both the wills (which had been written for him) that he had been dissatisfied a long time—that he wanted another will—that he did not want either of those before him, and that several times afterwards, (and, as is shown, after the time when Matthew states he deceived him with the letter) he spoke to him about writing a will, and “as though he did not have any will.” And finally, on the day when Trice last saw him, he said to Matthew, after the for-

Pryer and Pennington, caveators, vs. Coggin and McRory, propounders.

mer had come in, "Mr. Trice has come, and I want that writing done." Presently afterwards, Mr. Trice says he became speechless, and nothing was done.

It is impossible to deny, that such circumstances afford presumptions which a Jury might think sufficient to authorize the conclusion that the testator asked for his will for the purpose of destroying it; and that he afterwards did destroy it, or supposed he had done so.

It is true, as suggested, that on some portion of both the days when Trice had the interviews with him to which we have just referred particularly, the testator was affected by the paralysis with which he suffered, and became speechless; and it is possible that this may go to indicate that his mind was affected, also, at the time: but this was a consideration proper for the Jury. We cannot tell what is its true value. It does not show, however, that the other matter should not have been properly submitted to the Jury.

Add to these reflections, the fact of Matthew Coggin's advantage over the testator, as his nurse, at his bed side; his interest in the result, and the significance of the circumstances upon which we have been dwelling is increased, and these presumptions are strengthened. We should add, also, the reasonable motive of the testator (as stated by himself with regard to Pennington's land, &c.) for desiring to change his will, and the presumptions increase, that he did destroy that old letter, and supposed he had destroyed his will. Finally, it will be observed, that this old letter was not produced by the executors, whose interest it was to produce it; which circumstance adds great weight to the presumption that it was destroyed.

If these conclusions be correct, the Judge should have called attention to this view of the case in his charge; and have told the Jury, in effect, that if Matthew had practiced this deceit upon the old man, and the latter had destroyed the letter, thinking it was the will, such circumstances were equivalent to a destruction or revocation of the will itself; and have left it to the Jury to say whether or not such facts were in proof.

In connection with his failure so to do, the Court

Reeves, adm'r, &c. vs. Matthews.

ered in saying to the Jury that there were two *main* questions in the case. 1. Did the testator know the contents of the will at the time of its execution? 2. Was he of disposing mind and memory? By ignoring the circumstances on which we have been commenting, and by this expression of *two* leading or main considerations, he excluded the idea that there was any other in the case. Whereas, if what we have said be right, that which the testator had done equivalent to a destruction of the will, was just as important a question as his knowledge of its contents, or the soundness of his mind at the time of its execution. The Jury may have thus been misled as to the materiality or importance of these circumstances.

¹Let the judgment be reversed.

No. 77.—ALLEN REEVES, administrator, &c. plaintiff in error,
vs. ROMULUS W. MATTHEWS, defendant.

[1.] Where a plaintiff had brought actions against several defendants, for the recovery of certain negroes, the defendants having common cause of defence, and an agreement was entered into between the parties, that the several issues should be determined by one trial, and that such evidence was to be admitted on the trial of this case as would be admissible in either of the cases: *Held*, that by virtue of this agreement, a defendant in one of these cases, though not the immediate party to the case which was tried, was a competent witness.

[2.] An administrator is not, necessarily and as matter of right, entitled to recover property because his intestate died in possession of it.

[3.] An estoppel *in pais* results from acts or words, or both, which are intended to induce another to act in some matter touching his interest, on which he does act, and by which an advantage is gained by him who speaks or acts, or by which injury results to the other party. It is founded in fraud, or in gross negligence equivalent to fraud.

[4.] Admissions which do not amount to an estoppel as thus defined, may

Reeves, adm'r, &c. vs. Matthews.

yet be good testimony against the party making them, when regarded simply as evidence of title.

Trover, in Crawford Superior Court. Tried before Judge POWERS, September Term, 1854.

This was an action for negroes, brought by the administrator of William Reeves, against the defendant in error, who claimed them under the will of William Cleveland:

The mother of the negroes had formerly been the property of Cleveland, whose daughter William Reeves married, but had been in the possession of Reeves from 1827 until his death in 1850. William Cleveland, by a will dated in 1835 and proven in 1844, had bequeathed these negroes, after the death of William Reeves, to the children of his daughter, Milly Reeves, one of whom was wife of the defendant, to whom he bequeathed them for life. There was much conflicting evidence as to whether Reeves, in his life-time, claimed these negroes as his own or not—some witnesses testifying that he did, and that he had offered to sell part of them at different times; and others testifying, that he admitted the title to be in Cleveland, and that he had only a life estate; and that he knew the contents of Cleveland's will and had given it his sanction, and claimed title under it.

This case was one of several, brought by the same plaintiff, against the different sons and sons-in-law of Mrs. Milly Reeves, involving the same questions; and it was agreed that this one should be tried, and that the issue of it should control the others, and that such evidence be admitted on the trial of the one case, as would be admissible in either of them.

Upon the trial, James M. Reeves, one of the defendants in the cases in question, was offered as a witness for the defendant, and objected to on the ground of interest, which objection was over-ruled by the Court and his testimony received, and this is assigned as error.

The plaintiff's Counsel requested the Court to charge the Jury—

1st. That if William Reeves died in possession of the no-

Reeves, adm'r, &c. vs. Matthews.

groes sued for, then his administrator is entitled to recover them.

2d. That if Wm. Reeves yielded the negroes back to Cleveland, without consideration, it is a *nude pact*, and cannot be enforced.

3d. That altheugh Wm. Reeves may have admitted that the property was to go to the children of Milly Reeves after his death, yet, if the Jury believed that the negroes were given to Milly Reeves in her life-time, they vested in her husband, Wm. Reeves; and any promise without consideration, by him, is void.

Which charges the Court refused to give, but charged the Jury, that if William Reeves admitted that the title to the negroes was in Cleveland; and, after Cleveland's death, admitted that he held the negroes under his will, that such admissions, if unexplained, bound him and bound his representative. The Court charged likewise, that if such admissions were made by Wm. Reeves, either in express words or by his general conduct, to the executor of Cleveland or to either of the defendants, although they may not have been acted on by the defendants or the executor, yet, Wm. Reeves and his representative is estopped thereby, and will not be allowed to claim the property against such admissions.

Which charges and refusals to charge, are assigned as error.

W. & W. C. Poe, for plaintiff in error.

CULVERHOUSE, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The point first made in this case, viz: that upon the admissibility of James Reeves' testimony, is controlled by the agreement entered into between the parties, (which is set forth in the statement of facts accompanying this case,) to the effect that such evidence was to be admitted on the trial of one case as would be admissible in either of them—a stipulation which

Reeves, adm'r, &c. vs. Matthews.

seems to have been adopted for the exclusive purpose of obviating just such an objection as that made here..

[2.] The Court was right in refusing to charge, that if William Reeves died in possession of the negroes sued for, then his administrator is entitled to recover. This point was settled by this Court in the case of *Yeldell vs. Shinkholster*, (15 Ga. 189); and for the reasons which influenced that decision, we refer to that case.

[3.] The other points submitted make necessary a slight consideration of the nature and character of an estoppel *in pais*. We need not pause to discuss the difference between such ~~an~~ estoppel and a technical estoppel. Suffice it to say, that this kind of an estoppel results from acts or words, or both, which are intended to induce another to act in some matter touching his interest, on which he does act, and by which an advantage is gained by him who speaks or acts, or by which injury results to the other party. That is to say, one person, by his admissions or conduct, shall not be allowed to influence another, with whom he is dealing, and lead him into a line of conduct prejudicial to his interest, unless the party estopped be cut off from the power of retraction.

In all cases "where an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, there the character of an estoppel shall be given to what would otherwise be mere matter of evidence; and it will therefore become binding upon a Jury even in the presence of proof of a contrary nature." (*Stephens vs. Baird*, (9 Cow. 274.) *Welland Co. vs. Hathaway*, (8 Wend. 483.)

Of course, admissions which are made *in good faith* or by mistake, not the result of gross negligence, do not fall within such definition, for this sort of estoppel (being adopted by the Courts of Law from the Courts of Equity) must be founded in fraud or in gross negligence amounting to fraud. (1 Story Eq. §§286, 391.) *Brewer vs. Bos. & W. R. R. Co.* (5 Met. 482.)

Let us try the point in question by this rule. How were these defendants injured by these admissions of William Reeves,

Reeves, adm'r, &c. vs. Matthews.

supposing them to have been made, and supposing that they influenced the distribution of the property? They were put to no expense by such distribution, and have lost no rights by it, and have been rather benefited than injured by the same.

Though there is no issue here between the executor and the plaintiff in error, yet we may remark, that the former is not injured. He has discharged his duty, or what he supposed his duty, and cannot be liable for this distribution, should the question ever be made with him.

Having ascertained this, let us look to the charge, which was, that "if the Jury believed, from the evidence, that William Reeves admitted, either expressly or by his general conduct to the defendants, or either of them, that the property in dispute was held by him for life under the will of Cleveland, and at his death belonged to defendants, and confiding on these admissions, *acted upon the same in any way*, then the admissions are conclusive on the plaintiff, and defendants must recover."

Now, if we apply the principles which we have just understood governs in such cases, we find this instruction deficient, because the Court tells the Jury that the admissions are conclusive, &c. if the defendants *acted upon them in any way*. The rule declares that the party must *so act* that an advantage will be gained of him, or an injury result to him, unless the other is estopped, &c. But the Court says, he shall be estopped, if he act on the admissions in any way. This is plainly too loose, and was of a character which might mislead the Jury. If the record had shown any such action on the part of the defendants, as marriage of the daughters for example, having such property in possession; or if it had appeared that by reason of such admissions, a daughter had claimed such property, and this was generally known, and so claiming it she married, these things would illustrate the rule.

Reference was made in the charge to admissions made by Reeves before the death of William Cleveland, and it was argued that the latter may have acted upon them, and have made a disposition in favor of his grand-children, other than he would

Strawbridge *vs.* Mann *et al.*

have made. This should have been shown, if any thing like this were true. And in the absence of testimony going to show that such admissions ever came to the knowledge of William Cleveland, and influenced him in any manner, nothing is proven amounting, as we have seen, to an estoppel *in pais*.

The charge of Court, as to the effect of these admissions, considered simply as testimony, was correct.

[4.] The point made upon the refusal to charge as requested in the second request of Counsel for the plaintiff in error was, that if William Reeves derived title from Cleveland to the woman Esther, a bare promise, without consideration, as to what disposition should be made of her after the death of his wife, was void.

The doctrine thus contended for is correct enough in itself; but we are not sure, so far as it has reference to a promise, that it would have been authorized by the facts. So far as it relates to admissions made by Reeves against himself, going to show the character of his title to this slave and her increase, they may be looked to as evidence of such title; or if such were made and acted on *in the way we have pointed out*, they may amount to an estoppel.

Let the judgment be reversed.

No. 78.—JOHN J. STRAWBRIDGE, plaintiff in error, *vs.* H. T. MANN *et al.* defendants.

[1.] In 1841, a *f. fa.* is issued, and on it is entered *nulla bona*. In 1847, a *ca. sa.* is issued in place of the *f. fa.* In 1853, the *ca. sa.* is executed: *Held*, that when the *ca. sa.* was executed, the judgment had not become void, under the Act of 1823, as to dormant judgments.

Certiorari, in Bibb Superior Court. Decision by Judge POWERS.

On November 24th, 1841, John J. Strawbridge obtained a judgment, in the Inferior Court of Bibb County, against H. T. Mann and Samuel Moore; and on the next day, the 25th, *fi. fa.* was issued thereon, on which a return of *nulla bona* was made, Dec. 30, 1841, and a receipt for costs entered by the Clerk, July 11th, 1843, and no further entry. On the 17th March, 1847, *ca. sa.* was issued on said judgment, and an entry of arrest of the defendant, Moore, and bond and security taken, March 10th, 1853. At the next term, Moore not appearing, the plaintiff moved to forfeit his bond; upon which, Counsel for defendant moved to set aside the *ca. sa.* and declare the judgment dormant, because no return had been made on the *fi. fa.* or *ca. sa.* for seven years preceding the arrest, and that the *fi. fa.* was void because issued within four days after the judgment. The Inferior Court sustained the motion and ordered the arrest to be discharged, and the judgment to be declared dormant. On *certiorari* to the Superior Court, the Judge sustained the proceedings of the Inferior Court and dismissed the *certiorari*; and this decision is assigned as error.

W. & W. C. POE, for plaintiff in error.

RUTHERFORD, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the judgment dormant at the time of the arrest of Moore, the defendant therein?

This is the only question.

The arrest took place within less than seven years from the date of the *ca. sa.* The date of the *ca. sa.* was within less than seven years from the date of the judgment. The *ca. sa.* had been preceded by a *fi. fa.* on which was an entry of *nulla bona*.

Such being the facts, was the judgment void by the opera-

Strawbridge vs. Mann et al.

tion of the Act commonly called the Dormant Judgment Act?

The first section of that Act is in these words: "All judgments, that have been obtained since the said 19th day of December, 1822, and all judgments that may be hereafter rendered in any of the Courts of this State, on which no execution shall be sued out, or which executions, if sued out, no return shall be made by the proper officer for executing and returning the same, within seven years from the date of the judgment, shall be void and of no effect: *Provided*, that nothing in this Act contained shall prevent the plaintiff or plaintiffs, in such judgments, from renewing the same within the expiration of the said seven years, in cases where, by law, he or they would be otherwise entitled so to do, but the lien of such revived judgments on the property of the defendants thereto, shall operate only from the time of such revival."

This Statute, with respect to this section of it, is one of those to which this Court has applied the principle of *equitable interpretation*. That principle is one which makes a Statute include a case which, though not within the words of the Statute, is within the mischief aimed at by the Statute; or exclude a case, which though within the words, is not within the mischief.

This principle, in both of its modes of operation, has, by this Court, been applied to this Statute; in the first of the modes in *Booth vs. Williams*, (2 Kelly, 253); in the second, in *Wiley et al. vs. Kelsey et al.* (3 Kelly, 275.) In *Booth vs. Williams*, one entry had been made within seven years from the date of the judgment. That case, therefore, was *not within the words* of the Statute; yet, the Court considering the case to be within the mischief, held it to be included within the Statute. In *Wiley et al. vs. Kelsey et al.* there had been no return or entry during a period of seven years. That case, therefore, was *within the words* of the Act, as they had been construed by the Court, in *Booth vs. Williams*; and yet, the case was considered, by the Court, not within the mischief; and therefore, not within the Act.

Let us, then, applying this principle of interpretation to the Statute, see if this case is within the Statute.

Strawbridge vs. Mann et al.

And first—if the case is within the Statute at all, it must be because it is within the *mischief*; for it is not within the *words*. There was an entry upon the *fi. fa.* within fewer than seven years from the date of the judgment.

Was the case, then, within the *mischief*? What was the *mischief* the Statute wished suppressed? It was some *mischief* which the Statute thought could be suppressed, by an entry's being made upon executions once every seven years. So, in effect, held this Court in *Booth vs. Williams*. But what possible *mischief* is there which could be suppressed by an entry's being made on executions once every seven years, which would not be equally suppressed by the happening of what happened in this case—which was, an entry of no property, made within seven years of the date of the judgment—a return into office of the *fi. fa.* made, within seven years from the date of the entry—an issuing of a *ca. sa.* occurring on the return of the *fi. fa.*—occurring, within seven years from the date of said entry. Lastly, an arrest under the *ca. sa.* made within seven years from the issuing of the *ca. sa.*? I can conceive of none.

If there is none, then what happened in this case, was sufficient to prevent the case from being within the *mischief* which it was the object of the Statute to suppress; and so, to prevent it from being within the Statute.

And this case is distinguishable from that of *Booth vs. Williams*, in this: that in that case, there was no return of the *fi. fa.* into office with an entry standing on it of *nulla bona*—no issuing of a *ca. sa.* on the return of the *fi. fa.*—two things, both of which, in this case, happened within the first seven years after the date of the judgment—two things, which, taken together, must be considered as calculated to be fully as beneficial to creditors of or purchasers from a defendant in *fi. fa.* as would be any mere entry on the *fi. fa.* made by the Sheriff.

And this leads me to remark, that the *mischief* which this Statute was intended to suppress, was, if we are to judge by the preamble of the Statute which this amends, or by the *proviso* to the first section of this, itself, not a *mischief* to which

Strawbridge vs. Mann et al.

defendants in judgment were subject, but a mischief to which the *creditors* of, and the *purchasers* from such defendants were subject. But in this case, the party asking the benefit of the remedy, is neither such a purchaser nor such a creditor. He is one who stands in the place of such a defendant, or in a place no better than his.

Upon the whole, I may say that for these reasons and perhaps others, a majority of this Court consider this case to be not within the Statute; and so, that the judgment of the Court below ought to be reversed.

As for myself, it would not be right for me to leave the impression, that I think this Statute such as to require an entry to be made on executions once every seven years, to keep judgments from becoming dormant. I think the Statute such, that if one entry is made at any time within seven years from the date of the judgment, it will be sufficient to keep the judgment from falling within the Statute, and from becoming dormant. I am *sure* that the *words* of the Statute are such that if this is done, it will be sufficient. And in my opinion, the rule of rules in the interpretation of Statutes, is to follow the words, if their meaning is plain. This rule, it is true, I should feel myself at liberty to depart from, in the case of some old English Statutes, and some Statutes of our own which pursue old English Statutes, such as the Statute of Frauds and Statutes of Limitation; and in the case of a few other Statutes with respect to which, as with respect to those named, a different rule has been used so long as to have become as well known as the words of the Statutes, and to have been recognized in various ways by the legislative power as the true rule.

But as a general thing, with respect to the Acts of our own Legislature, I should feel myself rigorously bound down to the words. The words of those Acts are, what the great majority of the people of the State shape their actions by. It is the words only, that are published to them—and when, after they have followed the words of the law, they are told by the Courts that they have not followed the law, they feel, that for them,

Phillips *vs.* The State.

the law has been turned into a snare. And it is difficult to say that they have not the right so to feel.

I am aware of nothing in the Statute under consideration, that requires any departure from the rule, that the words, if their meaning is plain, must govern..

At Common Law, the lapse of time served merely as a ground for presuming a judgment paid, until shown to be unpaid. So was it still more decidedly by our Statute of 1812. (*Cobb's Dig.* 496.) This, it seems to me, is not a bad rule. Why, therefore, should we strain a Statute, to make the Statute repeal more of the rule than the Statute would, without straining, repeal? The Statute, without any straining, will find a number of cases to operate upon. These let it have. But why not leave the rest to the old law—that law which, for so many centuries, England has found to work well—that law which most, if not all, I believe, of the other States of this Union have adopted or enacted and still keep in force.

Of course, therefore, I concur in thinking the judgment of the Court below ought to be reversed.

No. 79.—CHARLES PHILLIPS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] The 12th section of the 7th division of the Penal Code, provides—that “Any person who shall draw or make a bill of exchange, due bill or promissory note, or indorse or accept the same in a fictitious name, shall be guilty of forgery;” Held, that under this Statute, it is not necessary that the indictment should allege that the act was done “with intent to defraud.”

Forgery, in Bibb Superior Court. Tried before Judge Powers, November Term, 1854.

Phillips vs. The State.

This was an indictment for the forgery of a promissory note for Twenty Dollars, delivered to Henry Tindall by the prisoner, signed with the name of "H. C. Neith & Son, No. 27, Bay street, Savannah."

The evidence showed that the prisoner had previously borrowed the sums of Five and Twelve Dollars from Tindall, representing his name to be Neith, and claiming to be one of the said firm of H. C. Neith & Son. The note was given in discharge of these two sums, adding three dollars "for the use of the money." Prisoner had registered his name at the hotel as Charles Phillips, before the giving the note.

It appeared that there was no such firm in Savannah as "H. C. Neith & Son."

Counsel for prisoner requested the Court to charge, that it was necessary to prove that the note was actually made and signed by the prisoner, and that the delivery of the note by him is not conclusive proof that he made and signed it. And also, that it must be proven that the fictitious name was assumed for the purpose of defrauding Tindall; and that if it appeared that he had used the name before the commission of the forgery, it was evidence from which they might infer that it was not assumed for that purpose. On the first and fourth grounds of request the Court charged as requested, but declined giving the second and third.

This is assigned as error.

LAMAR & LOCHRANE, for plaintiff in error.

WHITTLE, for The State.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] There were four requests made of the Court by Com-

Phillips *vs.* The State.

sel for the prisoner, when the evidence was closed in the case, viz: *First*, That it was necessary to prove that the note was made by the prisoner.

Second, That it was made by him in a fictitious name, with intent to defraud Tindall, the payee.

Third, That it must appear, from the evidence, that the fictitious name was used by prisoner with a view to perpetrate the particular fraud alleged to have been committed ; and that if it was committed—that is, if the money was obtained before the fictitious name was used, the Jury might infer that it was not used to perpetrate a fraud.

Fourth, That the mere delivery of a note is not conclusive evidence of its execution.

The Court gave the Jury the first and fourth requests as desired, but declined giving the second and third.

The defendant was indicted under the 12th section of the 7th division of the Penal Code, which is as follows: "Any person who shall draw or make a bill of exchange, due bill or promissory note, or indorse or accept the same in a fictitious name, shall be guilty of forgery ; and on conviction, be punished by confinement and labor in the penitentiary, for any time not less than two years nor longer than seven years." (*Cobb's Digest*, 803.)

It is clear, that under the law the offence is complete, provided it is made satisfactorily to appear, from the evidence, that the note was drawn and delivered in a fictitious name. Under the 1st section of this same head of the Code, the general offence of forgery is defined ; and there it is made necessary to allege, in the indictment, and consequently, to prove, on the trial, *the intent to defraud*. But in the particular species of forgery for which the defendant is prosecuted, as will be seen from the Statute, no such requirement is made. The Court is bound to presume that this omission was intentional. The law makes the *act* the *crime*, and infers a criminal intent from the act itself.

Such was the outline of the instructions submitted by his Honor, Judge POWERS, to the Jury ; and notwithstanding the

Smith *et al.* vs. The State.

ingenious argument of our brother Lochrane, we must say we find no fault in it.

No. 80.—WILLIAM T. SMITH, *et al.* plaintiffs in error, vs. THE STATE OF GEORGIA, defendant.

[1:] In Bibb Superior Court, it is the practice for the Court to call up criminal cases for trial whenever the Solicitor General announces himself ready. At November Term, 1853, the case of W T S, a defendant indicted for misdemeanor was called, and he not being present, his Counsel stated that by an agreement, as he supposed, between himself and the Solicitor General certain other cases were to be tried before this; and consequently, he had permitted his client to go home, but that he would have him in Court in ten or fifteen minutes, and claimed indulgence for this time. The Solicitor General did not remember having made any such agreement, and moved to enter judgment on the recognizance; the Court granted this leave, refused the indulgence asked, and ordered final judgment. Before it was entered, the prisoner made his appearance in Court, but the Court refused then to take up the case, or to open the order for final judgment: *Held*, that this was error in the Court.

Motion, in Bibb Superior Court. Decided by Judge Powers, November Term, 1854.

This was a motion to open the final forfeiture of a *scire facias* issued on a bond for appearance of a party indicted, the final judgment not having been entered, and was based on the following facts:

William T. Smith, indicted for a misdemeanor, had given bond for appearance, with John P. Smith as security; and failing to appear at November Term, 1853, the bond was forfeited and *scire facias* issued thereon. At November Term, 1854, the indictment being called up at the instance of the Solicitor General, and the defendant not appearing, his Counsel, Mr. Lochrane, stated that he understood the Solicitor Gen-

Smith *et al. vs. The State.*

eral to have agreed with him that certain other cases should be called up before this, and had dismissed the defendant from attendance; and he asked for ten or fifteen minutes time to send for him. The Solicitor General not admitting the existence of such an agreement, the Court refused the request of defendant's Counsel, and immediately took up the *scire facias* —the Solicitor General said he would take final judgment, and the Court made an entry to this effect on his docket.

Shortly afterwards, but before final judgment was entered, Wm. T. Smith came into Court—offered to pay costs of *sci. fa.* and his security offered to surrender him; the Court said he had passed on to other business and would not go back. The Counsel afterwards moved to open the final forfeiture, and to arrest the judgment thereon; which motion the Court refused, and the defendant's Counsel excepted to that decision. It appeared from the certificate of the Judge, that it is the practice in Bibb Superior Court to allow the Solicitor General to call up criminal cases as he is ready for trial.

LAMAR & LOCHRANE, for plaintiff in error.

WHITTLE, for The State.

By the Court.—STARNES, J. delivering the opinion.

It is our opinion that the Court erred in ordering final judgment upon this recognizance, for the following reasons:

1. Because of the agreement between the Solicitor General and the Counsel for the prisoner, as it was understood by the latter. Such a misapprehension or mistake by Counsel has been recognized as a good ground for a new trial. It is not controverted but that the representation of the Counsel was made in good faith. All the facts show that there was no intention on the part of prisoner or his Counsel to evade a trial; and therefore, we think the Counsel was fairly entitled to the slight indulgence asked, or to have been put upon some other

Smith et al. vs. The State.

reasonable terms before judgment was entered upon the *scire facias*.

2. Because the case was taken up out of its regular order. It is said that this is an arrangement common in the Superior Court of Bibb County; that the pressure of business makes the practice expedient, by which the Solicitor General may call up any criminal cause at any period of the term, when he is ready to try; and that defendants must be held rigidly to this rule.

This practice may be expedient. We will not say it is not so. But it certainly is a very unequal one. Without disturbing it, we will now only say, that where such a practice does obtain, where this great advantage is given to the prosecuting officer for the State, there is certainly the more cause why a reasonable indulgence to the prisoner should be granted. Not why he should be indulged generally, or relieved from a rigid enforcement of the law; but a cause why he should have accorded to him an indulgence reasonable and just, under the circumstances; and such, we think, was the character of that asked for here.

3. Because this defendant was surrendered before final judgment on the *scire facias*, as the bill of exceptions shows.

In this judgment, securities are interested; and their rights are to be considered. We are all, as a Court, familiar with the practice which allows a security, upon a recognizance, to discharge himself at any time before final judgment, by surrendering the prisoner and paying the costs of *scire facias*. We were of the opinion that there was some Statute on this subject, but have not been able to find it. The practice may be of Common Law origin. At all events, it is a reasonable practice—and a just one, as applicable to this particular case.

Let the judgment be reversed.

'Haynes *vs.* The State.

DENNIS E. HAYNES, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

- [1.] As to how far the credit of impeached witnesses may be considered as restored, depends much upon the *nature* as well as the *extent* of the corroborating testimony, viz: whether they be corroborated as to the *main*, rather than as to immaterial facts; also, to the number of particulars in which they are corroborated.
- [2.] To reduce a homicide from murder to manslaughter, the slayer is not obliged, before the mortal wound is given, to *retreat* from his domicile or his family.
- [3.] If one entitled to the joint use of a well, go there to draw water for his family, and upon a sudden affray, in the heat of passion, take the life of the other joint-tenant, in consequence of a sudden violent attack made upon him by the latter, the killing will be manslaughter, unless made necessary to save himself from death or some great bodily harm.
- [4.] Before the law of necessity can exist, a cause of necessity must exist.
- [5.] To constitute justifiable homicide, *se defendendo*, the slayer must be faultless; he must owe no duty to the deceased—he under no obligation of law to make his own safety a *secondary* object; otherwise, he is amenable to the law of the land, without any immunity under the shield of necessity.
- [6.] This Court stands pledged, by its past history, to abolish, to the extent of its power, all exclusionary rules which shut out any fact from the Jury which may assist them in the ascertainment of the truth of the issue committed to their trial and decision.

Murder, in Fulton Superior Court. Tried before Judge WARNER, October Term, 1854.

While impanelling the Jury in this case, the State put upon the prisoner one Reuben Haynes, and also one William McWilliams, without first administering either the oaths prescribed by the Statute of December, 1843, or the oath prescribed by the Act of 1853, to wit: "Have you any conscientious scruples with regard to capital punishment." The bill of exceptions states that the prisoner accepted both the Jurors, without requesting the oaths to be administered.

The State also put upon the prisoner one Thomas A. Wil-

Haynes vs. The State.

liams, who was accepted by the prisoner, and was required to be sworn in chief. Before the oath, in chief, was administered, the Juror, himself, voluntarily stated to the Court that he was under the age of twenty-one years; and for this cause, he was set aside by the Court, "without the consent, and contrary to the express wish of the prisoner." J. W. Cason one of the tales Jurors, before he was put upon the prisoner, stated under oath, that he had a sick child at home who required his personal attention; and for this reason, asked to be discharged from serving as a Juror. The Court excused this Juror, without the consent of the prisoner.

After the bill of indictment was read to the Jury, the case opened by the Solicitor General, and a portion of the evidence on the part of the State had been received, "a Juryman by the name of Robert W. Fleming was, by the Court, and without the consent of the prisoner, permitted to separate from his fellow-Jurors, under the charge of a Bailiff sworn to attend him, and go to his house in the city, and there remain some two hours, under the charge of the Bailiff, and then return to the Jury, the said Juror having first sworn, that he had then a sick child at home who required his personal attention."

Among the *trials* appointed by the Court, was a Mr. Beman, an Attorney at Law then residing in Atlanta, Fulton County; *after the trial was over*, it was made to appear to the Court, that Mr. Beman had not resided in Atlanta six months, and not more than three or four months, before the trial.

After the first forty-eight persons summoned as Jurors were disposed of, other tales Jurors were summoned by the Sheriff; and out of which second set of tales Jurors, the balance of the Jury was made up.

After the evidence and the argument closed, the Counsel for the prisoner asked the Court to charge the Jury as follows:

1st. We ask your honor to charge the Jury, that although drunkenness will not excuse the commission of a crime, and although "a prisoner can derive no privilege from madness voluntarily contracted by him;" yet, voluntary drunkenness upon

Haynes vs. The State.

an indictment for murder, "the intoxication of defendant may be taken into consideration as a circumstance, to show the act was not premeditated."

2d. We ask your Honor to charge the Jury, that a threat made under excitement, no matter from what cause this excitement emanated, will not authorize a Jury to presume that an act done after that threat made was deliberately done, and that a homicide committed without any mixture of deliberation whatever, cannot be murder in the law.

3d. We ask the Court to charge the Jury, though voluntary drunkenness cannot excuse from the commission of crime; yet when, as upon a charge of murder, the question is, whether the act done was *premeditated* or done only from sudden heat and impulse, the fact of the party being intoxicated, has been held to be a circumstance proper to be taken into consideration.

4th. That being intoxicated is no excuse for *crime*; yet evidence of drunkenness may be admissible to the question of malice, to show the character of the homicide.

5th. We request your Honor to charge the Jury, that if the prisoner was sensible of what he was about to do and did the act *intentionally*, still, if the Jury are satisfied, from the evidence, that the killing was the result of a fear for his life or enormous bodily harm induced by the improper unlawful act of deceased at the time of the killing, still, the Jury must, from the evidence, determine whether this homicide was the result of *malignity of heart*, or whether it was imputable to human infirmity.

6th. That if the Jury believe, from the evidence, that Haynes had been put in possession of this well and premises, Haynes was not, by the law, compelled to run from a trespasser, leaving his property to the mercy of the trespasser; but that, by the law, he may legally oppose force to force, and that he may legally oppose whatever force the pressure of the circumstances demanded, to prevent a felony or to prevent some serious, dangerous, bodily harm.

7th. That if the prisoner, when at the well, was where he had a legal right to be, that he had a right to remain there.

Haynes *vs.* The State.

and there protect his property or his person; and in such case, he is not obliged to retreat, but may legally pursue his adversary until he finds himself out of danger; and if, in such a conflict, Haynes killed Griggs, it was justifiable.

CHARGE OF THE COURT:

This is a case, The State *vs.* Dennis E. Haynes and George Lofton and John M. Brown, for murder—and the prisoner, Haynes, having severed on the trial, you will consider this case as against Haynes only. You have listened patiently and attentively to the argument of Counsel. It now remains for the Court to give you its views of the law which it deems applicable to the case. You are judges of the law as well as the facts. I desire your attention while I endeavor, as clearly and concisely as I can, to give you my view of the law, but you are not *absolutely* bound by the law as given in charge by the Court. You have the right to be judges of it yourselves. You are the exclusive judges of the facts detailed by the witnesses. The indictment is before you. It alleges that Dennis E. Haynes, on a certain day mentioned in the bill of indictment, at a certain place mentioned therein, did of his malice aforethought, unlawfully, wilfully and feloniously kill and murder James R. Griggs. To this charge the prisoner has plead not guilty, and thus has an issue been made up in which the State holds the affirmative. The State must *fully* prove the prisoner's guilt, as charged in the bill of indictment, which you will have before you. The State, I say, must fully prove the guilt beyond reasonable doubt, of the crime as charged, before you can find him guilty. Permit the Court to call your attention to some of the rules of evidence as applicable to this case. It is the province of the Court to decide upon the admissibility of evidence. It is your province to judge for yourselves, what facts that evidence establishes. You are exclusively to judge as to the weight of the evidence and the credibility of the witness. Prisoner's Counsel contend that some of the witnesses have been impeached. One mode of impeaching witness is to introduce other witnesses, who testify that they are discredited

Haynes vs. The State.

with the general character of the witness for truth and veracity in the neighborhood in which he lives, and from their knowledge of that character they would not believe the witness on his oath in a Court of Justice. If any witnesses have been thus impeached, you have the right to set their testimony aside entirely; and it is your duty to do so unless the testimony of such witness is corroborated by other witnesses, whose credibility has not been attacked; and corroborated, you will give it such weight as you may think it entitled. The credit of a witness may be materially affected or totally destroyed by the manner of giving evidence, as by an inconsistent statement of facts, &c. As to the doctrine "*false in one point false in all*," if a witness swear *wilfully* false in one material point, you may disregard his entire testimony, unless corroborated by the evidence of some unimpeached witness or witnesses, unless it be attributed to mistake or inadvertence, want of memory, &c. If there has been any evidence in this cause impeached by any of these rules, you are at liberty to believe or disbelieve it, as you think proper. An accomplice, or one indicted in the same indictment, not on his trial, is a competent witness—as to his credibility, this is a matter entirely for you to consider—take into consideration his relative position to the case.

The Court charges you that the fact of his being indicted as an accomplice, is a circumstance against his credibility. The weight to be given to such testimony, you must judge exclusively for yourselves. Where a threat is proven to have been made and susceptible of two constructions, the one an innocent, the other a criminal construction, the rule is, that you should give such threat that construction most favorable to the prisoner. But if you believe any threat was made by the prisoner which is only susceptible of a criminal construction, you should give that construction. You are the exclusive judges of this matter.

"A crime or misdemeanor shall consist in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention or criminal negligence." "A person shall be considered of sound mind, who is neither

Haynes *vs.* The State.

an idiot, a lunatic or afflicted by insanity, or who hath arrived at the age of fourteen years, or under that age, if such person knew the distinction between good and evil." "Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice or contrivance of other person or persons, for the purpose of having crime perpetrated, and the person or persons so causing said drunkenness for such malignant purpose, shall be considered a principal, and suffer the same punishment as would have been inflicted on the person or persons committing the offence, if he, she or they had been possessed of sound reason and discretion." "Homicide is the killing of a human being of any age or sex, and is of three kinds—murder, manslaughter and justifiable homicide."

Before you can find the prisoner guilty of any offence, you must be satisfied, from the evidence, that there was a killing. Is Griggs dead? If so, from the evidence, who was the slayer? If you are satisfied on these two points, viz: that Griggs is dead, and that prisoner is the slayer, then you may inquire what kind of homicide has been perpetrated in this case—murder, manslaughter or justifiable homicide? "Murder is the unlawful killing of a human being in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied." The killing must be unlawful. Justifiable homicide would not be an unlawful killing. Then what is malice? "It is of two kinds—express and implied. Express malice is that deliberate intention, unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof." Malice shall be implied when no considerable provocation appears, and when all the circumstances of the killing show an abandoned and malignant heart. There can be no murder without malice, either express or implied. You have heard what malice is. There must be a deliberate intention, unlawfully to take away life, to constitute murder; a deliberate design unlawfully to kill. For instance, express malice may be shown by previous threats to take away the life of another, made recently before the kill-

Haynes *vs.* The State.

ing. Implied malice may be illustrated as I did it a few days ago, in charging the Jury in another trial for murder then before this Court: As if one were furiously to ride or drive through a crowded street, and carelessly kill a person by riding or driving over him, though there might not have been a deliberate intention to kill; yet, his conduct, evincing such reckless disregard of human life, malice might be implied. Now it is for you to say whether Griggs is killed; if so, by whom? And if you find, from the evidence, that prisoner killed the deceased, and that the killing was done with malice, either express or implied, then you ought to find the prisoner guilty of murder!

"Justifiable homicide, is the killing of a human being by commandment of the law, in execution of public justice—by permission of the law, in advancement of public justice—in self-defence or defence of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony upon either; or against any persons who manifestly intend or endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or living therein." Now it is contended by prisoner's Counsel, that this is a case of justifiable homicide. This is a question for you to determine for yourselves, under the law and the evidence. To prevent a mere trespass, is not sufficient to justify a homicide. Homicide is not justifiable unless the killing is to prevent the party killed from committing a felony. (Here the Court stated to the Jury what constitutes a felony under the law.) If, after persuasion, remonstrance or other gentle measures used, a forcible attack and invasion on the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so attacking or invading the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack or invasion, and that serious injury was intended or might accrue to the person, property or family of the person killing.

If a person kill another in his defence, it must appear that

Haynes vs. The State.

the danger was so urgent and pressing, at the time of the killing, that in order to save his own life, the killing of the other was absolutely necessary; and it must appear also, that the person killed was the assailant, or that the slayer in good faith endeavored to decline any further struggle before the mortal blow was given. All other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide. A bare fear of any of these offences, to prevent which this homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of these fears, and not in the spirit of revenge. Take all the circumstances into consideration. Where was it? Who was there? Why was the prisoner there? For what purpose? What did he do? What did deceased *manifestly intend to do?* Did he intend to commit a felony? If you believe deceased intended to commit a felony on the prisoner, his property or habitation, then prisoner was justifiable. Was there any felony perpetrated or intended to be perpetrated? Were rocks thrown? Did they hit prisoner, or fall harmless at his feet? Was deceased rushing on him with a weapon likely to produce death? Was a felony intended to be committed? Was it necessary to take Griggs' life, to prevent the felony, or did the prisoner have reason to apprehend that Griggs intended to inflict upon prisoner some serious bodily harm; and did prisoner really act under the influence of these fears, and not in the spirit of revenge? A bare fear will, in no case, justify a killing. What did Griggs do? What weapons did he use? Did Haynes retreat? Did Griggs assault Haynes with rocks or pole? Was the danger urgent? So urgent that Haynes could not retreat? In the opinion of the Court, Haynes was not justifiable in taking Griggs' life, if he could have avoided it by a retreat in safety. Was he influenced by fear at the time of the killing, or was he actuated by deliberate revenge? Had Haynes, as a reasonable man, reason to apprehend danger of his life—did he ~~act un-~~

Haynes vs. The State.

der these fears? If he could have retreated and did not, in the opinion of the Court, this is not justifiable homicide. The danger must have been urgent and pressing, and there must be such circumstances as would justify a reasonable man in so believing. As has been read by Counsel, (*Lelfrede's case,*) in the case of the person who with the pistol loaded with powder only. If Griggs acted so as to alarm the fears of a reasonable man, and to justify a reasonable man in the belief that his life was in danger, even though it was not; still, if the prisoner acted under the influence of such fears, then is he justifiable.

As to that which took place at the house previous to the day of the killing, that is to be considered by you only so far as to ascertain whether there was malice or not in the prisoner. If there was any such provocation as would justify pris.; yet, if he had had time to cool, after provocation, before the killing, then such provocation cannot avail him.

As to the possession of the premises and the well. In the opinion of the Court, if the Sheriff put the prisoner in possession, even if his possession be joint with Griggs; still, Haynes would have as much right to go to the well or into that part of the house as he had been put into possession of, as Griggs had. He would, if he was in possession, have the right to break the lock without being considered a trespasser; and it would have been a trespass for Griggs to lock up the well to prevent Haynes from getting water at it. The property spoken of in the Statute as an habitation, means a dwelling, kitchen or buildings contiguous to the dwelling. A store-house, even if the owner do not live in it at the time; and even a well, if in the curtilage. You have no right to kill, in protecting any of these from a mere trespass, but you may to prevent a felony. If the well were locked by Griggs, it was a trespass only; or if in Griggs' possession, and Haynes broke the lock, it was only a trespass in Haynes; and in a trespass of this kind, in the defence of this kind of property, the party killing cannot le-

Haynes vs. The State.

gally justify the killing. It is for you to say, under the evidence, who had the possession of this well; and it is for you to say, whether this is a case of justifiable homicide; and if you find it justifiable homicide, you will acquit the prisoner entirely. There is yet another kind of homicide; and if the evidence shows the prisoner guilty of that kind of homicide, then it is your duty so to find him. (Here the Court read that part of the Penal Code in relation to voluntary manslaughter and involuntary manslaughter.) I allude to manslaughter. Manslaughter is the unlawful killing of a human creature without malice, express or implied, and without any mixture of deliberation whatever. Which may be voluntary upon a sudden heat of passion, or involuntary, in the commission of an unlawful act or a lawful act, without due caution and circumspection. Now is this a case of manslaughter, under this definition of that offence? If so, is it voluntary or involuntary manslaughter? Was there any actual assault on Haynes by Griggs? Provocation by words, threats, menaces or contemptuous gestures, shall, in no case, be sufficient to free the person killing from the guilt and crime of murder. Was there any assault or attempt to commit a felony by Griggs upon Haynes? (The Court read a definition of an assault in the Code.) If there was, and there was not sufficient time to cool and for deliberation, between such provocation and the mortal blow given, and there was no malice, either express or implied, then you should find the prisoner guilty of manslaughter. Was there a combat? Was there any fight between prisoner and deceased? Who was the assailant? Then what produced this killing? Was it on account of that sudden impulse of passion, supposed to be irresistible? If so, then it was manslaughter only. If there was time, between the provocation and homicide, sufficient for the voice of reason and humanity to be heard, then the killing should be attributed to deliberate revenge, and the killing will be murder. If you believe that Haynes had malice before the killing, and had gone to the well to draw water, and that Griggs then made an assault upon him, so fierce and induce Haynes to kill him under the influence of sudden pas-

Haynes *vs.* The State.

sion, before he had time to reflect and cool, this is manslaughter *only*.

The license to practice law. What effect that shall have on your minds, as evidence, is for you to say. This instrument proves only the fact, that Haynes was admitted to practice law, and it does not prove any other fact. If the prisoner relies on this license to prove his good moral character at the time of the killing, the license will not do so. Good moral character, at that time, must be shown in another way by witnesses. As to Griggs' character, Haynes can't justify under Griggs' violent, overbearing or dangerous character alone, but you may look into that character of Griggs', to ascertain the motives under which Haynes acted, and to satisfy your minds on the ground of fear and apprehended danger from Griggs. To avail Haynes of Griggs' character, it must appear that Haynes was acquainted with Griggs' character for violence, &c. Look into this to see if Haynes was or was not reasonably actuated by fear. (Here the Court took up one written request to charge; and reading over the first ground, he said: The Court has already read you the Code upon the subject of drunkenness, and will read it again.)

"Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice or contrivance of other person or persons, for the purpose of having a crime perpetrated, and then the person or persons so causing said drunkenness, for such malignant purpose, shall be considered principal, and suffer the same punishment as would have been inflicted on the person or persons committing the offence, if he, she or they had been possessed of sound reason and discretion." If a party kill another under the influence of voluntary drunkenness, it is the same as if he kill another when he is sober.

As to the 2d request: The Court gave the 2d request in charge, as requested, and stated also, that a threat which he would not have made, in his cooler moments, or made under excitement of any kind—this is entitled to very little weight.

Haynes *vs.* The State.

But if he were excited by a spirit of revenge or malice against Griggs, that may be regarded with much greater weight in considering the question of malice. (Here the Court read the 3d request, and said this doctrine I think, is correct, if there was such a phrenzy as to make the prisoner unaccountable; but in this case the Court refuses to give this ground in charge, to its full extent.) (Here the Court read the 4th request, and said, if he made threats while he was drunk, they were not entitled as if made sober.) Fifth request. The Court charged, as requested in that ground. Sixth request. The Court said this is true, as to the force: but if Griggs was a trespasser and Haynes took his life, he cannot justify, even if it was *his own* property. He ought to have retreated before the mortal blow was given, in order to justify the killing, if he could have done so without danger to his life or person. This may be taken into consideration to show whether there was malice or not. (Here the Court read the 7th request and said, the Court will not so charge, but the Court charges, if Griggs only intended to commit a trespass, prisoner had no right to kill; but he ought to have retreated, if he could have done so without injury to his life or person; and if the prisoner retreated and was pursued by Griggs, and you believe from the evidence, that Haynes, so retreating, to save his own life, or to prevent Griggs from inflicting on his person some grievous bodily harm—under such circumstances, he can justify the killing. As to doubts, you must be *fully* satisfied that the prisoner's guilt has been *fully* made out by the evidence; and it is the business of the State to make out this proof fully. No preponderation of evidence is sufficient, unless, to your satisfaction, the guilt of the accused, is beyond reasonable doubt. If the evidence satisfies you as reasonable men, beyond reasonable doubt, that is sufficient. You are not to look for mathematical certainty, as 2 and 2 make 4. You have taken an oath, that you have no prejudice or bias resting on your minds, either *for* or *against* the prisoner at the bar; that you are impartial; look well into the evidence as delivered from the stand, and to the law; and if you believe the prisoner is guilty of any crime, say so; and

Haynes vs. The State.

say what crime that is; and if you believe him guilty of no crime, render a verdict of not guilty.

Here the Counsel reminded the Court, that he had not charged as requested in the argument, to wit: that if Griggs, at the time of the killing was rushing on the prisoner with a weapon likely to produce death, and thus excited the reasonable fears of Haynes thereby, so that he feared that if he did not kill Griggs that the said Griggs would kill the said Haynes, or inflict upon him a serious and grievous bodily harm; and if Haynes shot Griggs really under the influence of fear, and to prevent this felony, then Haynes is justifiable. And the Court here charged the Jury, if Griggs was using a weapon likely to produce death, and was in striking distance of Haynes, at the time the fatal blow was given, or if Haynes was, by this weapon, put in fear of his life or serious bodily harm, and really acted under such fear, he is justifiable.

The Jury returned the following verdict:

We, the Jury, find the prisoner, Dennis E. Haynes, guilty of murder, and recommend him to mercy.

The prisoner, by his Counsel, B. H. Overby and A. W. Hammond & Son, moved to arrest the judgment on the following grounds: Because—1st. It is apparent, on the face of the indictment, that the allegations in the bill of indictment are contradictory and repugnant; and therefore, contrary to law.

2d. Said indictment charges two distinct offences, of different grades, against three different persons, in the same bill of indictment, and in the same count, which is bad.

3d. Three distinct offences cannot be legally joined by the same indictment, of different grades, against different persons; and therefore, this indictment is bad, and a good ground in arrest of judgment.

The Court, after hearing argument, over-ruled this motion.

The prisoner, by his Counsel aforesaid, then moved for a new trial on the following grounds:

1st. That the finding of the Jury is contrary to law and the evidence given on the trial of said case.

2d. That the verdict was contrary to the charge of the Court.

Haynes vs. The State.

3d. After the Jury was charged with the case and had heard a portion of the testimony given in the case, said Jury separated, by Robert W. Fleming, one of the Jurors impanelled to try said cause, having left his fellow-Jurors and gone to his own house, where he remained about two hours, without the consent of the prisoner or either of his Counsel—it being made to appear to the Court that he had a very sick child at his house in the city—and the Court permitted such Juror to go home to see said child, where he remained about two hours, under charge of a Bailiff, appointed by the Court for that purpose.

4th. It was error in the Court to appoint, as a trior of the Jury, Henry D. Beman, who was not at the time entitled to a vote in the County of Fulton for the members of the Legislature in this State, there being no objection to said Beman by the prisoner or his Counsel at the time.

5th. That the Court erred in permitting the first Juror and the second Juror sworn, to be put upon the prisoner, without being sworn upon his *voir dire*, or without being asked whether they had any conscientious scruples as to capital punishment.

6th. That the Juror, Jesse Jenkins, after he was sworn to try the prisoner as a Juror, held a conversation with one Basileel Langston, without the Court's or prisoner's consent, before the Jury was impanelled. (Addenda.) On swearing said Langston, he stated that Jesse Jenkins, a Juror, after he had been before the triors, came back to where he was sitting before he went before the triors, and voluntarily commenced a conversation with said Langston, and asked said Langston if he thought he would get home that night? and the said Langston told the said Jenkins that he thought not; that he thought he was good for the week, or words to that effect. And the said Juror further said if I had not made the remark, that if the triors were not satisfied, that he would satisfy if he had to pull off his shirt, Overby would not have taken him.

7th. That one of the Jurors, William McWilliams, after he was sworn to try the said cause, held conversation with Eevi W. Harville, without the consent of the prisoner or Court. (Addenda.) Mr. Harville, sworn, says: "That after the

Haynes *vs.* The State.

liams, the second Juror, one of the triors, came back into the Court room and said a Juror who had been put on the triors was so badly scared he could not talk; and not hearing what said McWilliams said, said McWilliams repeated it; and that that is all the conversation he recollects.

8th. That a Juror, Thos H. Williams, was put upon the prisoner without any preliminary questions being asked by the Solicitor General and accepted by the prisoner; and after that, the Court, on its own motion, discharged the Juror, contrary to the express wish of the prisoner, it being shewn to the Court under oath of Juror, that he was under 21 years of age.

9th. It was error in the Court to discharge J. W. Cason, one of the tales Jurors, upon his own motion, without consent of the prisoner. (*Addenda.*) The said Cason, on his oath, saying that his wife was sick and required his personal attention, at that time, at home, on that account. The Court erred in not arresting the judgment upon the verdict for the grounds stated in the motion to arrest.

10th. It was error in the Court to charge the Jury, that the license of the prisoner as an attorney at law, was evidence of nothing but his being an attorney at law; and that they could not regard this as evidence of his peaceable character, at the time of the killing.

11th. Prisoner's Counsel asked the Court to charge the Jury, if they believed from the evidence, the defendant was in the rightful possession of the well and appurtenances, at the time of the homicide, that he was not bound to retreat from any attack of deceased, but could justifiably oppose force to force; and that the Statute gave defendant the right to defend his person and property against any one who manifestly intends to commit a felony on either. The Court refused to give this charge, but charged the Jury, that the defendant was bound to retreat if he could, without danger to himself, before the mortal blow was given; and that the property mentioned in the Statute had reference only to the habitation of the prisoner—smoke-house, kitchen or such property, on which a felony could be committed; or if prisoner had a store, even if he did

Haynes vs. The State.

not live at it; and that any thing that took place at the house or well previous to the evening of the killing, was only to be taken into the consideration for the purpose of ascertaining malice on the part of the prisoner; which charge and refusal to charge, the Counsel for the prisoner says was error in the Court; that the well might be within the cartilage, and then might be the subject of a felony.

12th. The Court erred in refusing to charge the Jury according to the written request furnished to the Court, before he commenced his charge by prisoner's Counsel.

13th. The Court erred in charging on every ground of the written request handed him by the Counsel of the prisoner, before he commenced his charge, in not charging as requested, and especially as to the fifth ground; because the Court, as to that ground, merely observed that he had already charged this, without reading the request handed him, to the Jury.

14th. Counsel for prisoner moved the Court to grant a new trial on this ground, because the verdict of the Jury was decidedly and strongly against the weight of evidence given in the cause.

15th. The Court erred in compelling the Counsel for the prisoner to announce, before the verdict was received by the Solicitor General (after the Jury was called by the Clerk and said they had agreed upon a verdict), or read by the Jury to the Court, whether prisoner desired to poll the Jury, although prisoner's Counsel insisted before the Court that the verdict should be first read. And the Court, on request of prisoner, polled the Jury before verdict was read, under the practice of the Courts in such cases. The Court gave, then, the privilege to the prisoner to poll the Jury after the verdict had been read, which he declined.

16th. That in polling the Jury, the Court erred in asking of each several Juror, as called up, before the verdict was read to him in open Court, "is that your verdict?"

17th. It was error in the Court to charge the Jury on the subject of threats. When one threatens to take away the life of another, recently, before the killing, is evidence of express

Haynes *vs.* The State.

malice, and the Court having so charged, Counsel for the prisoner say it was error.

18th. The Court erred in its illustration of implied malice, as applied to the case before the Court on trial.

19th. It was error in the Court to charge—"if the prisoner could have retreated and did not, in the opinion of the Court this is not justifiable." And the Court having so charged, the prisoner says it was error.

20th. Prisoner introduced George Blackstock, who swore he saw Griggs between sun down and dark on the evening of killing, throwing rocks and chunks from the road over the palings into his lot; had his coat off, his sleeves rolled up, bare-headed, appeared to be angry; was swearing and was alone.

On motion of Solicitor General the Court ruled out this testimony.

After hearing argument, the Court over-ruled the motion for a new trial.

To all of which decisions and rulings of the Court, prisoner, by his Counsel, excepted and now assign the same as error.

OVERBY; HAMMOND & SON, for plaintiff in error.

Sol. Gen. BLECKLEY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Counsel for the prisoner having relied on six grounds only for a reversal of the judgment in the Court below, the rest being waived in the argument, the decision will be restricted to the first five—this Court declining to express any opinion as to the weight of the evidence.

Ought the testimony of George W. Blackstock to have been rejected? He swore that between sun down and dark, preceding the night on which Griggs was killed, he saw deceased throwing stones and chunks from the road, over into the yard of his lot; that he was alone, with his coat off and his shirt

Haynes *vs.* The State.

sleeves rolled up; and that he was cursing and appeared to be in an angry mood.

It will be borne in mind that the controversy in this case is, not whether Haynes killed Griggs. As to that, there is no dispute. But the question, and the only one is, did he do it under such circumstances as will mitigate the offence to manslaughter, or even make it justifiable homicide in self-defence? And in order to arrive at a correct conclusion upon this point, it is important to ascertain the temper and conduct of the parties, to determine who was most likely to have brought about the emergency which resulted in the death of one of the combatants. The proof shows that Mrs. Haynes, the wife of the accused, had been driven away from the premises the same afternoon, with threats of violence to her husband, should he venture to draw water out of the well. It also appears, from the testimony of George A. Lofton, that when Haynes went over the night of the killing, to get water, that Griggs threw stones at him; whether the same that he had previously prepared, is left uncertain; and was, we think, a fact very properly to have been submitted to the Jury. We are clear that Blackstock's testimony should have been received.

[1.] The next complaint is, that the charge of the Court, as to the impeachment of the witnesses, was too vague and indefinite. The substance of the instructions upon this head was, that unless the testimony of the Griggs family—mother and children—was corroborated, the Jury might repudiate it entirely. Otherwise, they might believe it or not, as they should see fit. We ask, how corroborated? A great many facts were testified to, many of them wholly immaterial. Suppose them to have been corroborated in a single immaterial fact, would that restore their credit *in toto*? We would earnestly, though most respectfully, recommend the practice of generalizing less and particularizing more, in applying legal principles. The credit of impeached witnesses is restored certainly to a much greater extent, when corroborated as to the *nature* than the immaterial facts of the case. Besides, much depends upon the extent as well as the nature of the ~~corroboration~~.

Haynes *vs.* The State.

Suppose five facts constitute the proof in the case, and the impeached witnesses are sustained as to *four*, would not their credit be much more effectually restored than if corroborated as to *one only*? Were, for example, the widow, her son and daughter, whose character for truth and veracity was impeached by a dozen or more witnesses, corroborated upon *every point*, except as to the killing, would we not the more readily and reliably believe them as to that also?

I trust that my brethren of the bench will excuse this suggestion. I give it as the result of thirty-four years' experience, that ordinarily, *general charges*, however abstractly true, are worse than useless—their effect being to misguide, instead of directing the Jury to a right finding; and the only instructions which are worth any thing, are such as enable the Jury to apply the law to the *precise case* made by the proof. If the case comes within an exception or limitation of a general rule, restrict the investigation until the exact point upon which it turns stands out prominently before the eye of the Jury, stripped of all generalities. Their task is then comparatively easy and safe.

[2.] [3.] Was the Court right as to the doctrine of *retreat*, as applicable to this case? If Haynes was entitled to the joint use and occupancy of the well, and he went there to draw water for his family, was he bound to retreat therefrom, because violently assaulted by Griggs? And does his justification depend upon that? Must one retreat from his house or his family, and leave the former to the occupancy and the latter to the tender mercies of the aggressor? Such is not our understanding of the rights of a citizen. In the opinion of this Court, instead of charging the Jury that Haynes was bound to retreat as far as he could in safety, we think they should have been instructed "to inquire, first, as to the right of Haynes to the enjoyment of the well, in common with Griggs. And if so, did the prisoner go there to procure water for his family, or was this a mere pretext; and did he seek the contest for the purpose of killing the deceased? If they found the latter to be true, Haynes was guilty of *murder*! Again: Did he mere-

Haynes vs. The State.

ly go to the well to get water, and in the heat of passion slay the deceased, in consequence of the sudden and violent assault made upon him, it not being necessary for him to do so in order to save his own life or protect himself from great bodily harm? If they should find these to be facts, then Haynes is guilty of *manslaughter*. But there is still another question. Did the prisoner shoot in defence of his life? Was it necessary to save his own life—not *his property in the well*—from such a serious assault as would create a reasonable apprehension that his own life was in imminent peril? If so, and he shot to avert the threatened danger, he will be justified.

[4.] It has been well said and settled, however, that before the law of *necessity* can exist, a case of *necessity* must exist.

[5.] The slayer, himself, must be faultless; he must owe no duty to the deceased; be under no obligation of law to make his own safety a *secondary* object; otherwise, he is answerable to the law of the land, without any immunity under the shield of necessity.

[6.] Should the testimony as to the violent altercation between the parties, on a day previous to the killing, have been restricted as it was by the Court, to the simple purpose of showing malice in Haynes? We think not. Why limit the testimony to this object? Did it not serve, in some degree, as a key to the motives and conduct of the parties in the final interview, which terminated so fatally? This Court stands pledged by its past history, for the abolition, to the extent of its power, of all *exclusionary* rules, which shut out facts from the Jury which may serve, directly or remotely, to reflect light upon the transaction upon which they are called upon to pass. For one case gained by improper proof, ninety-nine have been lost or improperly found, on account of the parties being precluded, by artificial rules, from submitting *all* the facts to the tribunal to which is committed the decision of the cause. Verdicts, notwithstanding their etymological meaning, (*vere dicere*) will never speak the truth, because Juries can never measure the power and influence of motives upon the actions of men, until the door is thrown wide open to all facts.

Clark and another, adm'rs, &c. vs. Clark et al.

assist, in the slightest manner, in arriving at a correct conclusion in the pending controversy.

Complaint is made, that the professional license of Haynes was allowed to be read, for the purpose only of showing that he had been admitted to plead and practice law as an Attorney. We see no error in this. If the object was to raise the presumption of the good character of the defendant, it was inadmissible for that purpose, if for no other reason, because his commission bore date long prior to the killing. It is contended, however, that it served to explain what is construed into a threat by the prisoner, namely: that he would take the law into his own hands—meaning, thereby, as it is insisted, that he intended to manage his own case, in re-occupying the premises in dispute, and from which he had been ejected by Griggs.

We are unable to perceive why the license should not have been legitimately used for the latter purpose, under the decision of the Court; and we apprehend it was so used. At any rate, we see nothing in the record to contradict this idea.

No. 82.—JOHN D. CLARK AND ANOTHER, administrators of David Clark, deceased, plaintiffs in error, vs. COLUMBUS CLARK AND OTHERS, defendants.

[1.] Upon a proper case made by the representatives, suggesting doubts as to the meaning of the testator's will, and difficulties in its execution, and praying for relief, it is the duty of the Court to render a proper decree in the premises, giving direction as to the true interpretation of the will, as well as the fulfilment of the trusts therein created.

In Equity, in Houston Superior Court. Decided by Judge Powers, October Term, 1854.

Clark and another, adm'rs, &c. vs. Clark *et al.*

In 1850, David Clark died, leaving his last-will and testament, as follows :

After directing that his debts be paid, he says : " Item 3d. I desire that my farming interest be kept together, under the direction of my wife, Lucretia, and some person employed by her discretion, competent to manage a farm until my son Columbus comes to lawful age, then he, Columbus, to have the amount of Two Thousand One Hundred Dollars in property, and a horse, bridle and saddle ; which amount is equal to that already given to my first born son, John David. And I also direct and desire that my third son, George Franklin, have, when he shall come to lawful age, the same amount in property, viz: Two Thousand One Hundred Dollars, and a horse, bridle and saddle ; and that all necessary expenses for education and other expenses, incidental to the proper training and comfort, be defrayed from the proceeds of the farm.

Item 4th. In the event of my wife Lucretia again connecting herself in marriage, I desire and direct that all the land I may have in possession, together with all the stock, be sold; that she share the proceeds equally with them ; in all respects to have and share equally with my children.

Item 5th. I direct and desire, that when my land and stock shall be sold, that my daughter, Mary Lucretia, receive for her share, Twenty-five Hundred of the proceeds of said sale.

The 6th item appointed his executors. On the same day, the testator executed a deed of gift, which was never delivered, but found with his will, and was admitted to probate as a part of his will. By this instrument he gave to his daughter, Mary Lucretia, certain negro property for her separate use, and appointed his son, John David, the trustee for said property ; and "also, for that portion of the sale of his land provided for in his last will and testament." These papers were admitted to probate, and the executors having renounced, the plaintiffs in error were appointed to the administration, with the will annexed.

The administrator and administratrix filed this bill,

Clark and another, adm'rs, &c. vs. Clark *et al.*

fact that it was doubtful, from the will, whether the farm was to be kept together only until Columbus Clark arrived at age, or to be still kept together afterwards; that it was very inconvenient, and attended with loss to the estate, to keep up the farm; and that it was desirable to have an immediate distribution if practicable; that there was also doubt as to what portion the widow and other legatees took under the will; and whether the specific legacies should be paid before an equal division, or be considered in the division. On these points the bill prayed the instructions and directions of the Court.

Columbus Clark was a minor when the bill was filed, but arrived at lawful age before the answers were made. George F. and Mary Lucretia Clark being still minors, a guardian, *ad litem*, was appointed for them.

The answers of defendants admitted the facts charged in the bill, joined in the desire of complainants for an immediate division, and claimed that it was the intention of testator that all his legatees should share equally in his estate.

The cause coming on for trial upon the bill and answers, the Court, upon the reading of them, dismissed the bill; and this decision is assigned as error.

GILES, for plaintiff in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This bill was filed by the representatives of David Clarke, deceased, suggesting doubts as to the proper construction of the will of the deceased, and asking direction as to the proper execution thereof. The legatees against whom it was brought, admitted, by their answer, that the doubts and difficulties suggested by the complainants did exist and interpose serious obstacles to the fulfilment of the trust created by the will; and consequently, concurred in the prayer for direction, *as.*

The bill was dismissed, upon what ground, we are not informed by the record. And to reverse this decree, this writ

Clark and another, adm'rs, &c. vs. Clark *et al.*

of error is prosecuted. No reason occurs to this Court, why this is not a proper case for the interposition of a Court of Equity. And with that intimation, we remand the cause, taking it for granted that, upon the hearing, a proper decree will be rendered; such an one as will accomplish the objects of the testator; or if this be not practicable, as nearly so as possible—due regard being had to the rights and interests of minors, as well as all others concerned.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT CASSVILLE,
APRIL TERM, 1855.

Present—JOSEPH H. LUMPKIN,
EBENEZER STARNES, }
HENRY L. BENNING, } *Judges.*

No. 83.—GEORGE H. COUCH, plaintiff in error, *vs.* JAMES TURNER, Sr. and others, defendants.

- [1.] The general rule is, that the lessor in ejectment ought to have a subsisting title or interest in the premises; but under special circumstances, the Court will permit the demises to be retained.
- [2.] One man should not be allowed to rob another of his land, by using the title of a third person, with whom he has no connection.
- [3.] A plaintiff in ejectment should be permitted to recover under a demise from a third person, when it shall clearly appear that he has a *bona fide* claim or pretension to the premises—but owing to some defect in his chain of title he is unable to recover in his own name.

Ejectment, in Fannin Superior Court. Decision by Judge IRWIN, November Term, 1854.

This was an action of ejectment brought by John Doe, on the several demises of James Turner, Sr., Smith Turner, Jas.

Couch *vs.* Turner *et al.*

Turner and David Turner, heirs, &c. and O. F. Adams, against Roe and Geo. H. Couch, tenant in possession.

When the case was called on the appearance docket, the defendant's Counsel moved to strike out the demises in the names of the Turners, on the grounds—that they nor either of them have authorized the use of their names, and that it was not necessary, for the assertion or enforcement of any rights, legal or equitable, of Obadiah F. Adams, who is the party in interest, and who brings this suit.

The motion was supported by the affidavit of George H. Couch, stating his information and belief of the facts set forth in the motion.

The motion to strike out was over-ruled by the Court; and on this decision error is assigned.

There being no appearance for defendant, the case was heard *ex parte*.

UNDERWOOD, for plaintiff in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The motion to strike out the demises from the Turners, was prematurely made. Couch, the tenant in possession, makes oath that he is informed and believes, that the plaintiff had no authority to use the name of the Turners; neither was it necessary, for his protection, that he should do so.

Perhaps a sufficient reply to this showing would be, that the defendant's information may not be reliable. And surely the rights of the plaintiff are not to depend upon a mere peradventure.

The showing is insufficient in any aspect of it. Upon executing to the Turners an indemnity against costs, Adams had the right to use their name, with or without their consent. And this the Court decided should be done. And whether or not the use of the name of the Turners was necessary to enable Adams to enforce his claim, he, and not Couch, was the best judge.

Hammond, trustee, *vs.* Stovall.

We recognize the general rule, as contended for by Counsel for plaintiff in error, namely: that a person ought not to be made a lessor in ejectment, who has no subsisting title or interest in the premises. There are exceptions, however, even to this rule; and under special circumstances, the Court will permit the demises to be retained.

[2.] We will willingly lend our aid to prevent one man from robbing another of his land, by using the title of a third person, with whom he has no connection. But it will be time enough for the Court to interfere, when, at the close of the testimony, this fact is made apparent.

[3.] It frequently happens, that owing to some defect in the chain of title, the plaintiff is unable to recover, except by laying a demise in the name of some previous party. And this he should be permitted to do, whenever it shall clearly appear that he has a *bona fide* claim or pretension to the premises. Otherwise, it would be both unreasonable and unjust to allow the tenant to be disturbed. (See *Wiley Kinsey et al. vs. The Lessee of Sensborough*, decided during the present term.)

No. 84.—W. L. HAMMOND, trustee, plaintiff in error, *vs.*
JAMES M. STOVALL, defendant.

[1.] Four years' possession of a chattel in another State, will not confer a title, by virtue of the 4th section of our Statute of 1822, as against a judgment lien on said property obtained in this State—the chattel having been removed before the judgment could be enforced.

[2.] Where a negro slave, subject to the lien of a judgment, in this State, was taken into the State of South Carolina and sold to an innocent purchaser, where he remained for more than four years: *Held*, that such purchaser did not acquire title by virtue of the Statute of Limitations of that State, as against the lien of the said judgment; and that as the State of South Carolina has already made a similar decision, as to a slave taken from this into that State, the comity of the two States is not violated.

Hammond, trustee, *vs.* Stovall.

by a judgment which holds the said slave liable to seizure upon the execution, on returning into this State.

Claim, in Franklin Superior Court. Tried before Judge JACKSON, October Term, 1854.

In 1841, John R. Stanford obtained, in Franklin Superior Court, a judgment against Job Hammond for \$142 $\frac{55}{100}$, with interest. The defendant appealed and gave James M. Stovall as security; and the plaintiff again recovering, the money was made out of Stovall, and he obtained control of the *f. fa.* against Job Hammond. Pending the appeal in 1842, Hammond conveyed to South Carolina, a negro belonging to him named Sandy, and there sold him to one Cresswell, from whom, through several hands, the negro was conveyed, by purchase, to Wm. L. Hammond, the plaintiff in error, as trustee of a marriage settlement. In 1851, the Sheriff of Franklin County, finding the negro Sandy in said County, levied said *f. fa.* on him, at the instance of Stovall; and claim was interposed by Wm. L. Hammond, trustee as aforesaid.

The question made upon the trial was, whether the claimant was protected by his possession of the negro in South Carolina, (he and those under whom he claimed having had such possession in South Carolina, for about nine years,) either by the Act of this State or of South Carolina, by which a purchaser of personal property is protected from the lien of judgments against his vendor, after four years' peaceable possession (in South Carolina five years).

The Court held that the property was still subject to the lien of the judgment; and on this decision, error is assigned.

AKIN, representing VANDUZER, for plaintiff.

COBB & HULL, for defendant.

By the Court:—STARNES, J. delivering the opinion.

The simple question presented in this case is, whether or not

Hammond, trustee, vs. Stovall.

a negro slave, on whom there was a judgment lien resting in this State, but who, before the same was levied, had been removed into the State of South Carolina, where he remained in the possession of purchasers, in good faith, for more than four years, can be levied on and sold under execution issued upon said judgment, if he be brought back subsequently, into this State.

[1.] For the plaintiff in error, it is urged, that by the 4th section of our Act of 1822, it has been enacted, that "no judgment shall be enforced by the sale of any real or personal estate, which the defendant may have sold and conveyed to a purchaser, for a valuable consideration, and without actual notice of such judgment: *Provided* such purchaser, or those claiming under him by such sale and conveyance, have been in peaceable possession of such real estate for seven years, and of such personal estate four years, before the levy shall have been made thereon"; that this Statute makes no exceptions to the rule which it prescribes; that it is not the policy of our Courts to add exceptions to the same, and that therefore, the case at bar should not form an exception.

We might recognize all this to be true, perhaps, and so recognizing it, feel that we were carrying the intention of the Legislature into effect, if it were a case where the claim in lien of the plaintiff in execution could have been asserted when the property had been removed beyond the State—if by any proceeding in South Carolina or elsewhere, it could have been carried into effect as against this slave. But in the nature of things, this could not be. The judgment possessed no lien there; and therefore, it is, we think, that the Legislature designed that this Statute should have application only where the property had remained within the State.

[2.] But it was also argued, that by the law of South Carolina, the plaintiff in error, by possession and lapse of time, had acquired a title to this slave, under and by virtue of the Statute of Limitations there in force, and that the comity which should prevail between coterminous States, requires the Courts of Georgia to recognize and protect such title. That

Hammond, trustee, vs. Stovall.

if title were not thus acquired by lapse of time ; yet, that inasmuch as the judgment lien asserted by the defendant in error, was inoperative in South Carolina, the purchase of the slave there, in good faith, vested a perfect title in such purchaser ; and the same comity requires us to respect that title.

As to what was said of the Statute of Limitations, we remark, that neither the plaintiff in error nor those under whom he claims, can derive title from that source, as against the claim of the defendant in error, for the simple reason, that his claim (a judgment lien) was of a character which could not be enforced in South Carolina, against this slave, by action of trover or any other of those actions which are operated upon by the Statute of Limitations.

The other ground is of more importance, and involves the serious consideration, whether or not, from respect to the comity of contiguous nations, and to avoid a conflict of laws, the Courts of such nations should hold, that whenever property, on which judgment liens rest is carried out of the State where the judgment is obtained, into a neighbor's territories, and title to it is there obtained by innocent purchasers, these liens are forever extinguished, although the property may return whence it was removed. This question is of especial importance in the slave-holding States of our Union, where slaves constitute so large a portion of our wealth; a species of property which, in the nature of things, may be so easily removed from one State into another.

To answer this question in the affirmative, we fear, would be to hold out dangerous encouragements to dishonest debtors. Still, whatever we might think of the policy of the measure, if our sister States were to propose it, or their Courts had adopted the doctrine, it would operate with something like an approximation to equality of right, and we should be prepared, perhaps, to meet them in the same spirit.

But so far as the State of South Carolina is concerned, her highest Judicial tribunal has determined this matter—has decided that a citizen of Georgia, under similar circumstances, could not be protected in his title to a slave, acquired in good

Woods, adm'x, vs. Howell.

faith in the latter State, against a judgment lien obtained in South Carolina—has anticipated the question of comity, and declared, not only that such a decision “holds out no conflict between the laws of the two States,” but that “harmony, not discord, will follow the principles which they have assumed.” *Richards vs. Towles*, (8 *Hill R.* 346.)

Nothing remains for us but to adopt the same view of the subject, where the case arises, as this does, between the laws of that and our own State.

Let the judgment be affirmed.

No. 85.—ELIZABETH Woods, administratrix of William Woods, deceased, plaintiff in error, vs. ANDREW HOWELL, defendant.

- [1.] An action brought for the recovery of negro slaves, being an action for a wrong which has benefited the estate of the wrong-doer, does not abate by the death of the defendant.
- [2.] The 12th section of the Judiciary Act of 1799, does not command, that where the defendant shall die, the plaintiff shall sue *out scire facias* instantly, upon the expiration of twelve months from the grant of letters to the administrator, and at no time afterwards; but is simply permissive in this respect, and allows the same to issue at any reasonable time thereafter.

Scire facias, in Lumpkin Superior Court. Tried before Judge IRWIN, October Term, 1854.

An action of trover for negroes had been brought by Andrew Howell against William Woods, who died pending suit. Elizabeth Woods took out letters of administration on his estate; and about fifteen months after the grant of the letters, the plaintiff sued out *scire facias* to make her a party to the suit..

Woods, adm'x, vs. Howell.

The administratrix objected to being made a party, on two grounds—

- 1st. That the action abated by the death of William Woods.
- 2d. That *scire facias* to make the said Elizabeth a party, could not issue after the expiration of so long a time from the granting of her letters of administration.

Both objections were over-ruled by the Court; and the defendant excepts, and assigns the same as error.

MARTIN, represented by McDONALD, for plaintiff.

AKIN, for defendant.

By the Court.—STARNES, J. delivering the opinion.

[1.] It was undoubtedly the rule at Common Law, that where the action “was founded upon any *malfeasance* or *misfeasance*, was a *tort*, or arose *ex delicto*”; such, for example, as trespass for taking goods, trover, false imprisonment, assault and battery, slander, &c. the maxim, *actio personalis moritur cum persona* applied. The Statute 4 *Edw. III.* ch. 7, so far modified this rule, as to permit executors, &c. to “have an action for trespass done to their testators, as of the goods and chattels of the said testators carried away in their life.” And it seems also to have been well settled, that where the deceased, by a tortious act, acquired the property of the plaintiff by converting it to his own use, and the estate of the deceased was thus benefited, although no action of trover or trespass would lie, yet the law would afford the plaintiff *some form of action*. (*Kinsey vs. Heyward*, 1 *Cowp.* 375. *Cravath vs. Plympton*, *adm'r.* 13 *Mass.* 453. *Hambly vs. Trott*, 1 *Cowp.* 373.)

By the 12th section of our Judiciary Act of 1799, it was enacted, that no suit shall abate by the death of either party, where the cause of action would survive in the same, or any other form.

Now we have shown that such a cause of action as this before us would survive, in some form, at Common Law. It is:

McGuffie vs. The State.

lows then, that under the above provision of our law, this suit would not abate, even if the action were, in form, an action of trover.

But such it is not. It is framed according to the new forms; and is essentially different in its structure from the action of trover. It does not depend upon the allegation of a trespass or *tort* for its support; and in its nature, is perhaps allied to those forms which, upon such a cause of action, might be supported at Common Law, after the death of the defendant.

[2.] That section of our Judiciary Act of 1799, which declares, that where the defendant shall die, "it shall and may be lawful for the plaintiff to issue a *scire facias* in manner aforesaid, immediately after the expiration of twelve months," &c. is permissive as to the time specified. It was not intended to command that the *scire facias* should be then instantly issued, or never afterwards. The language used is: "It shall and may be lawful," &c.; and this clearly shows, that the design of the Legislature was what we have declared. If it be issued in any reasonable time thereafter, we think it is lawful. And this *scire facias* was issued within such reasonable time.

Judgment affirmed.

No. 86.—ZEPHENIAH McGUFFIE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

[1.] A decision of the Court in a criminal cause, in which the indictment is afterwards *quashed*, cannot be excepted to as erroneous, in a case tried upon a subsequent indictment for the same offence.

[2.] It is not necessary to the organization or continuance of the Superior or Inferior Courts, that the High Sheriff should be present—his attendance may be by deputy.

McGuffie vs. The State.

- [3.] A Deputy Sheriff may appoint a bailiff to do a particular act, though he cannot appoint a Bailiff to do the general business of his office.
- [4.] It is within the discretion of the Court to determine the number of which the panel of *tales* Jurors shall consist in capital cases, and the number of panels which may be at the same time summoned.
- [5.] It is not necessary that the names of *tales* Jurors should be in the Jury box, or that they should be qualified to serve as Jurors at any time before trial. It is sufficient, if at that time, they have the legal qualifications of Jurors.
- [6.] If several Jurors be sworn when another is challenged, the Court may assign any two of those sworn to try the challenge.
- [7.] It is unnecessary to consider the merits of an objection to Jurors overruled by the Court, if, upon other grounds, the Jurors are passed for cause.
- [8.] An objection, that the indorsement and return of "true bill" upon an indictment was not signed by one of the Jury *as foreman*: *Held*, to have been rightly over-ruled, especially as the same was made after trial and verdict.
- [9.] A verdict to the following effect: "We, the Jury find, from the evidence produced, that the prisoner is guilty of murder," is not a special, but it is a general verdict of guilty.
- [10.] When, in the formation of a Jury in a criminal cause, one Juror has been sworn and another is challenged, the Juror sworn should be joined with two others selected by the Court to try the challenge.
- [11.] A Juror who has heard any portion of the testimony in a criminal cause, upon oath, before the trial, and who states that he has formed and expressed a decided opinion in relation to the prisoner's guilt, is an incompetent Juror; although, upon this being discovered after trial, and a motion for new trial is based thereon, he may swear that "he was influenced in his verdict, alone, by the evidence adduced before him, and the charge of the Court."
- [12.] The Jury are judges of the law in criminal cases, in this: that they have the legal right to acquit the prisoner, although the Judge may charge them, that if certain facts be proven, he is guilty according to law; and although they may find those facts to be proven. But the Judge is their safe and reliable adviser as to the law.
- [13.] A charge is defective which precludes the Jury from giving due weight and consideration to any material circumstance, the effect of which, in their minds, might have been to reduce the crime from murder to voluntary manslaughter.

Indictment for murder, in Floyd Superior Court. Tried before Judge JOHN H. LUMPKIN, May Term, 1854.

This was an indictment for the murder of John H. Lumpkin.

McGuffie vs. The State.

A former bill for the same offence was quashed and a new one found. The following points were made on the trial: when the fourth panel of forty-eight tales Jurors was put upon the prisoner, his Counsel objected to the array on the following grounds:

- 1st. That the High Sheriff was absent from Court and the Court could not legally be held without him.
- 2d. That two panels had been summoned together.
- 3d. That after one panel of forty-eight, every subsequent panel should consist of a less number.
- 4th. That the panel had been summoned by persons, some of them Bailiffs, and one a private citizen, whose only authority to act was the order of the Deputy Sheriff. These objections were all over-ruled by the Court, and the defendant excepts. (The above panel were all set aside for cause.)

Joseph Waters and John Rogers having been appointed by the Court as triors, and one Juror having been sworn in chief, the Court directed one J. W. George, a Juror challenged by the defendant, to be tried by the same triors, without joining to them the Jurymen who had been sworn in chief, the prisoner making at the time no objection, and this is assigned as error.

After two Jurymen, to-wit: Thomas and Andrews, had been sworn in chief, they were directed to act as triors, and acted as such through the impannelling of the Jury, without joining to them the other Juryman as they were sworn; and this is alleged as error. A Juror named Russell was objected to by defendant, because he was not a resident of the county at the last revision of the Jury box, so that his name was not in the box; and another named Morris, because he was not of age at the last election for members of the Legislature.

The objections were over-ruled, and the defendant excepts.

When panel No. 9 was put on the prisoner, it was objected to because twenty-four of the number were the regular panel for the second week of the Court, and had been summoned before the trial commenced; because some of them had already been put on the prisoner in other panels; and also, that many of them had been summoned on Sunday.



McGuffie vs. The State.

All which objections the Court over-ruled, which is alleged as error. All these Jurors were set aside for cause.

The Jury being impanelled, the following testimony was introduced in the cause:

A. S. Lorring, sworn by the State, says: that on July 18th, 1852, in this, Floyd County, the killing of John H. Wallace by the prisoner accused, he, witness and Mr. Jones were in co-partnership in making brick; they had two yards in one enclosure, and in the evening of the 18th day of July, Zephaniah McGuffie, the prisoner, came to witness to borrow a wheel-barrow to carry some boards to cover a house inside one of the yards, for Mr. Jones. Witness loaned prisoner the wheel-barrow, and the next thing he saw was deceased and prisoner pulling at the wheel-barrow. Deceased pulled prisoner and wheel-barrow both in the direction of the Mr. Jones' brick-yard. Deceased was attending to the brick-yard for Mr. Jones; was an overseer in the yard where there were about half dozen hands at work; deceased pulled prisoner and the wheel-barrow to where the brick were. Prisoner said to witness, do you allow this damned rascal to have the wheel-barrow? Prisoner then gathered up a stone and followed deceased on to the yard, swearing as he, prisoner, went, that he would use that stone on deceased; the next thing I saw, deceased was loading his wheel-barrow with brick; prisoner went up to where deceased was, and turned the wheel-barrow over; then deceased caught prisoner, took him by the collar, shook him (prisoner) until his hat dropped off, and said to prisoner, go away and let me alone; but deceased did not strike prisoner; prisoner then put on his hat and started off in the direction of Mr. Walker's; thinks prisoner boarded with Mr. Walker; from the brick-yard to where Walker lives, it was between one-half and three-quarters of a mile; the next thing he saw of prisoner he was coming back to the brick-yard with a gun; was gone between half and three-quarters of an hour; prisoner had a double-barrel shot gun worth about ten or twelve dollars. Prisoner walked into the yard and said to deceased, now God damn you, leave here, or I will kill you, and raised his gun to his (prisoner's) face.

McGuffie vs. The State.

ceased was engaged, with others, at the time, packing brick; and he said boys, go and take the gun away from him; some of the boys said, Mr. McGuffie, don't shoot here; then prisoner took the gun down from his face; prisoner was twenty or thirty yards from deceased; deceased said to prisoner, if you raise that gun again I will throw a brick-bat at you; prisoner raised his gun again, and deceased threw the brick-bat at him, and then deceased jumped over the brick-hack; where he jumped over it was between three and four feet high; when prisoner first put the gun to his face, deceased was standing in the crowd; when deceased threw the brick-bat at prisoner, he jumped over the hack and was in the act of picking up another brick, when prisoner walked round the end of the hack, fifteen or twenty feet and shot him in the lower part of the abdomen with a load from one barrel of the shot gun; the other barrel was cocked; when the gun fired deceased fell; prisoner then passed across the yard to where witness was, a distance of some seventy-five yards, and said, God damn him I have shot him too low; I intended to shoot him through his God damned heart, and he is not the first man I have shot; prisoner came over into the yard where the witness had charge of, and commenced loading the barrel he had just shot; witness then went over to see if deceased was dead; he found him lying on his belly, under the sill of the house Mr. Jones was building; deceased asked witness for water, which he gave him; while there the prisoner came then in fifteen or twenty steps of where they were and asked if he was dead; deceased replied he was not, and that if it was God's will he hoped he would not die; prisoner said God damn you, don't give me any of your sauce, or I will give you another charge; while loading his (prisoner's) gun in the yard, he boasted a good deal and said none of the McGuffie's had ever been run over and he would be God damned if he should; there was a fence between where prisoner was standing and where deceased was lying; the fence was made of plank upright, with two inches of space between them; deceased was lying where he could see prisoner, and when prisoner said God damn you, don't give:

McGuffie vs. The State.

me any of your sauce or I will give you another charge, he took the gun down from his shoulder and put it to his face. Deceased was twenty or thirty yards, when shot, from where the sill was, under which he was afterwards lying, and prisoner tried to go about one hundred yards from where he was loading his gun to the house where deceased was lying; deceased had as much control over the wheel-barrow as witness did; deceased lived four days after he was shot, when he died; witness saw deceased in the time he was confined; was present when he died; witness thinks died from the wounds.

Cross-examined—The enclosure contained about two acres; there was a fence all around; there were two brick-yards within their enclosure; witness and Mr. Jones were in co-partnership in one yard, the other belonged to Mr. Jones, and deceased controlled the hands of Mr. Jones' yard, and witness those of the other; Mr. Jones was having a house built. Mr. McGuffie was in the employ of Mr. Jones. Witness was at work in one yard, deceased in the other, prisoner on the house; the wheel-barrow belonged to Mr. Jones, but the understanding between Mr. Jones and witness was, that the wheel-barrow was as much for one as the other, while they were together; from the time that witness let the prisoner have the wheel-barrow, it was between one hour and a half, before he saw them scuffling; witness says that prisoner asked him if he allowed the damned rascal to have the wheel-barrow, and to the best of his recollection so stated it before; witness says the reason why he did not reply to prisoner was, that he knew deceased had as much control over the wheel-barrow as witness did; there was considerable difference in the size of deceased and prisoner; deceased was considerably larger than prisoner; when deceased took the wheel-barrow, prisoner took up a rock and followed deceased: but there was nothing to prevent his throwing the rock. Mr. Jones was not at the yard at the time; prisoner made no resistance when deceased shook him; witness says deceased did not throw but one brick and thinks he did not say in the former trial that deceased threw more than one brick; witness says there was no difficulty between deceased

McGuffie vs. The State.

prisoner that he knew of; prisoner accused him of taking his boat, for which witness paid prisoner; witness had some one's boat, but don't know whether it was his or not.

Samuel Stewart, sworn, says: Prisoner came to him and gave himself up; witness asked him what it was for; prisoner replied, he had shot deceased—had shot him too low—had intended to shoot him through the heart—said take me and hang me or do what you please with me; this was all he (prisoner) said at the time.

Samuel Johnston, sworn, says: He was going down to where the difficulty had happened, and met prisoner, perhaps in the custody of Mr. Wimpee; witness asked prisoner if he was the one who had shot deceased; his reply was, that he was the one; witness then asked if he thought he had killed him; prisoner said no, he thought not—said he intended to shoot him in the heart, but that he was a little frightened, and that deceased was in the act of throwing at him at the time and let the gun fall a little and shot; he thought he shot too low; witness had been acquainted with deceased for some time previous to the difficulty.

Cross-examined: Witness said he understood from the prisoner that the difficulty was about a wheel-barrow, but don't remember what he said about it; said also to witness that none of the McGuffies had ever proved cowards, and that he would not be the first to disgrace the family; said also to witness that he went home after his gun and thinks he (prisoner) said he loaded it, but is not certain.

William B. Jones, sworn, says: He (witness) owned the brick-yard; says there were two yards in the same enclosure; his (witness') own hands worked in one yard; and that he was in co-partnership with Mr. Lorring and Beesley in the other; deceased had control of the yard which he (witness) owned; deceased had about as much control over the wheel-barrow as Lorring; whichever needed the wheel-barrow the most he considered he had the best right to it; deceased's name was John H. Wallace, and that prisoner's name is Zephaniah McGuffie; prisoner had about five hundred shingles wheeled up to the

McGuffie vs. The State.

house—a sufficient amount to have kept him employed the balance of the day.

Cross-examined: Witness says he had prisoner; was at work for him; prisoner had been sick a few weeks before the difficulty happened; he was quite sick; witness sat up with prisoner when sick; deceased may have been at work while prisoner was sick; he (deceased) had been employed but a short time in the yard; prisoner's chest of tools was left at witness' house after the difficulty happened; don't remember when they were carried there; prisoner went to work as soon as he was able after his illness; prisoner may have grown a little taller since the difficulty, but don't think he is any heavier; witness generally had some white man to take charge of the hands in the yard; don't know whether prisoner knew deceased had control of the hands at the time of the difficulty or not.

Thomas J. Word, sworn, says: He is a practicing physician; went to see deceased; found him very sick, lying on his bed, with many shots in his belly, ranging from his navel down; witness, with Dr. Smith, made a *post mortem* examination after his death and found that as many as four shots had entered his intestines, had produced inflammation and destructive mortification, and in his opinion produced deceased's death; witness got out only two shot.

Cross-examined: Says the shot extracted looked like they were small sized squirrel shot; looked like he (deceased) had been shot with some larger than those examined; says deceased lived four days after being shot.

Counsel for the State asked the following charges, which were given by the Court: That the sworn duty and the only duty of the Jury, is to determine the issue made upon the bill of indictment; that they were not to consider the consequences of their verdict, and that their conscientious scruples upon the subject of capital punishment, has nothing to do with their verdict; that words and opprobrious language do not and, in law, cannot justify an assault.

The Court, after having said that he could give all asked in charge as the law, either by prisoner's Counsel or the State,

McGuffie vs. The State.

Counsel, when he read over this charge in the words requested, believing the language used inapplicable to any state of facts proved, according to the 8d section of the 4th division of the Penal Code; and then read from the Penal Code as follows, and charged it to be the law as applicable to the point: that provocation by words, threats, menaces or contemptuous gestures, shall in no case be sufficient to free the prisoner killing from the guilt and crime of murder. That if the prisoner raised and pointed his loaded gun at the deceased, within a distance which the gun would carry, this act was an assault, and the deceased was justified in making resistance; that if the prisoner presented a loaded gun at the deceased, within a distance that the gun would carry, deceased was justified in throwing a brick-bat at prisoner; and that the throwing of the brick-bat cannot be urged as any mitigation of the prisoner's conduct, in continuing the difficulty in such a case. If the prisoner presented a loaded gun, with an evil intention, and the deceased threw a brick-bat at him, and then the prisoner shot him, it is murder. Such a case shows that the prisoner began the difficulty, and that the deceased did no illegal act in throwing the brick-bat.

This charge was given by the Court with this qualification, expressed at the time: that provided it was done with malice aforethought, the crime would amount to murder. Counsel for the defendant, amongst other things, asked the Court to charge the Jury, that the Jury are the judges in criminal cases, both of the law and the facts, and have the legal right, both to construe the law and apply the facts—which charge the Court gave with this qualification: “the law as given you in charge by the Court.” To the whole of which charge, thus given, Counsel for the prisoner then and there excepted, and here in this Court excepts. After the rendition of the verdict, which is as follows:

“We, the Jury, find from the evidence produced, that the

McGuffie *vs.* The State.

prisoner, Zephaniah McGuffie, is guilty of the murder of John H. Wallace. JOHN L. NIX, Foreman of the Jury."

After the rendition of the verdict, defendant's Counsel moved in arrest of judgment on two grounds—

1st. That the bill of indictment does not show that any one was foreman of the Grand Jury that found it.

2d. That the verdict is not a general verdict; and therefore, illegal.

The motion was over-ruled by the Court, and this is assigned as error.

Prisoner's Counsel then moved for a new trial, alleging as errors the various rulings of the Court before mentioned; and also, on the ground of newly discovered testimony, going to contradict one Lorring, a witness for the State; and also, that R. R. Bunce, one of the Jury, had heard the testimony on a former trial of this case, and had, before the trial, expressed a decided opinion of the guilt of the prisoner, which fact was unknown to the prisoner until since the trial.

With this motion sundry affidavits were filed; those touching the witness, Lorring, are not necessary to be inserted. The following were filed, as to the Juror:

GEORGIA—FLOYD COUNTY:

The State *vs.* Zephaniah McGuffie. Indictment for murder in Floyd Superior Court. In open Court, May Term, 1854, came Zephaniah McGuffie, and being sworn, says—that he did not know that Rufus R. Bunce, one of the Jurors who tried the above case at this term of the Court, had formed and expressed his opinion against this deponent until since the trial and rendition of the verdict, and had he so known, he would not have consented to take him, the said Bunce, on the said Jury; and says further—that since the trial aforesaid, he has discovered evidence—new evidence—by which he expects to contradict the witness Andrew J. Lorring, who testified against him—which evidence is set forth in the affidavit hereto annexed, and was unknown to this deponent until since the said,

McGuffie vs. The State.

trial; and this deponent did not, until since the trial, know of any evidence to contradict the said witness, Andrew J. Loring. Sworn to before me in open Court, June 1st, 1854.

A. B. Ross, Cl'k S. C.

Z. McGUFFIE.

The following is the statement of the Juror:

Rufus R. Bunce, sworn, says: That he was present at the first trial, and heard the testimony given in to the Jury on the trial; that he had an opinion as to the guilt or innocence of the prisoner at the bar, but his opinion, although formed, he thought was not so fixed and decided as could not be changed by the evidence more full and satisfactory; he had formed the opinion that the prisoner was guilty; when asked whether the opinion was decided, he answered that it was a decided opinion; he further swears that he was influenced as a Juror in his verdict alone by the evidence adduced before him as a Juror and the charge of the Court; says that he had not expressed the opinion to the prisoner and his Counsel before the last trial, but expressed it in part since; he thinks that he had expressed the opinion to others before the trial. Sworn to in open Court and signed,

RUFUS R. BUNCE.

A. B. Ross, Clerk.

By the affidavit of L. P. Walker, it appeared that he heard Rufus R. Bunce, since the trial at the present term, say, that he was present at the former trial of this case and heard all the evidence, and has, from that time, made up and formed a decided opinion as to the guilt of the prisoner, and had expressed it, as he thought.

The motion for a new trial was over-ruled; on which decision as well as the other decisions and charges excepted to, error is assigned.

J. W. H. UNDERWOOD, for plaintiff in error.

C. H. SMITH and Sol. Gen. WORD, for The State.

McGaffie vs. The State.

By the Court.—STARNES, J. delivering the opinion.

[1.] It is first alleged that the Court committed error in directing the Deputy Sheriff to summon certain persons as *tales* Jurors, who, at the time, were leaving or about to leave the Court room.

The indictment under which this proceeding took place, was subsequently quashed, and a new bill was returned, on which the trial proceeded, which we have now under consideration. The point made, therefore, has nothing to do with this case, and should not have encumbered the record.

[2.] The Court did not err in refusing to quash the fourth panel of Jurors summoned, because the High Sheriff was not in attendance on Court.

Our Judiciary Act, in declaring that “the Sheriffs of the several counties shall attend the Superior and Inferior Courts in the respective counties,” &c. is simply directory to the Sheriff. It was not intended that his presence should be *necessary*, to the organization and continuance of the Court. Besides, it may be correctly said, that attendance by duly qualified deputy, in legal contemplation, is attendance by the Sheriff.

[3.] The Court below was also right in refusing to dismiss this panel, on the ground that the Jury had not been summoned according to law—a portion of the panel having been summoned by Jesse P. Ayer and others, who were acting as Bailiffs.

It appears by the record, that these persons had been appointed Bailiffs by the under Sheriff, for the purpose of executing this particular duty. This was lawful. An under Sheriff may constitute a Bailiff for the purpose of doing a particular act; though he cannot appoint a deputy to do the general business of the office. (*Leak vs. Howell, Cro. Eliz.* 583. *Parker vs. Kett, 1 Lord R.* 658. *12 Mod.* 467. *1 Salk.* 95. *Hunt vs. Burrell et al.* 5 *John.* 138.)

[4.] The several panels put upon the prisoner consisted of forty-eight Jurors; and it was objected, after verdict, that all

McGuffie *vs.* The State.

ter the first panel had been summoned, each successive panel should have consisted of a less number.

The regulation of this matter at Common Law, in capital cases, frequently seems to have depended very much upon the exigencies of the trial, and was within the discretion of the Court. (10 Co. 105, a. 8 Bac. Abr. Tit. *Juries*, C. *State vs. Lamont*, 1 Hawk. 175.) Our Statute of 1799 declaring, as it does, that "when, from challenge or otherwise, there shall not be sufficient number of Jurors to determine any civil or criminal case, the Court may order the Sheriff or his Deputy to summon by-standers or others, sufficient to complete the panel," &c. in effect, places this regulation within the discretion of the Court, if it were not so before. The panel which is thus directed to be made complete, is of course the panel of twelve who are to try the case; for the language employed pre-supposes that the other panel is exhausted "by challenge or otherwise." The authority, then, which is given for the purpose of making this panel complete, is general, and not restricted, by any Common Law practice, as to the number of which the successive panels should consist. For convenience sake, perhaps, it may be more judicious to pursue the old practice in some cases. But the matter may be safely left where, we think, the law places it, viz: with the sound discretion of the presiding Judge.

[5.] In this case, one E. W. Russell was challenged by the prisoner, (when presented as a Juror,) on the ground that his name was not in the Jury box at the time of its last revision, though he had been six months in the county before the trial, and was otherwise a competent Juror.

Objection was made, too, to Sion Morris, on the ground that he was not of age at the period of the last general election, though of full age at the time of trial.

It is our opinion that the law does not require that the names of *tales* Jurors should be in the Jury box, or that they should have had the qualifications of Jurors at any time previous to the trial. It is sufficient, if they have the legal qualifications of Jurors at that time. There are several reasons for this view

McGuffie *vs.* The State.

of the subject; but we cannot dwell on them, as there is so much of this case, and so many more important points for our consideration.

[6.] It is insisted that when Daniel F. Sawyer was challenged as a Juror, and put upon triors, the Court erred in allowing him to be tried by two only of the Jury, several others having been before that time sworn.

The practice pursued by the Court was known to the Common Law, and is pursued generally by the Courts of our State. "If six" (Jurors) "be sworn and the rest challenged, the Court may assign any two of the six sworn to try the challenges." (*2 Hal. Hist. P. C.* 275. *1 Ch. Cr. L.* 549. *8 Bac. Abr. Ar. Juries, E.* 12.) For obvious reasons, this is a better practice than to require all who are sworn to try each challenge.

[7.] Objection was also made, that one of the panels of *tales* Jurors was summoned on Sunday. But it appears by the record, that every one of the Jurors thus summoned, was challenged and passed for other cause. It is unnecessary for us to give any opinion upon this objection.

So too, it was objected, that a Grand Juror who was upon the Jury which returned the first bill against the prisoner was summoned upon one of the panels of the Petit Jury. But it appears, that he too was passed for other cause, and no injury resulted to the prisoner.

Fuqua Beasley and William Ellison had been summoned on a previous panel of *tales* Jurors, and were again returned upon another panel, and put upon the prisoner; and this, too, was objected to as error. These Jurors were likewise passed for cause; and it is unnecessary for us to say any thing in relation to the point made.

[8.] Error was also assigned upon the refusal of the Court to arrest the judgment, because the return and endorsement of "true bill" upon the indictment was not signed by any one, as foreman of the Grand Jury.

Upon this point we remark, first, that it has been held, that there is no positive law requiring that the foreman of the Grand

McGuffie *vs.* The State.

Jury should sign the finding at all. This seems not to have been required at Common Law. And so it has been decided in South Carolina. *Creighton vs. Bell*, (1 Nott & McC. 256.). Our Statutes make no change in this respect. Though, as the Court say, in the case just cited, we think the practice usually adopted is advisable.

In the next place, we observe, that this return seems to have been signed by a Juror; but he did not sign as foreman. It could easily have been made certain by the minutes of the Court, however, we suppose, that he was foreman of the Jury; and if so, this might have been done; for in such case, *that is certain which may be made certain*.

Lastly, this is an exception which goes rather to the form than to the merits of the proceeding, and should have been taken before trial, according to the provisions of our code.

[9.] A verdict, such as that before us, is not a special verdict. It is, in effect, a general verdict of guilty. A special verdict is rendered when the Jury find certain facts to exist, and leave the Court to determine whether or not, according to the law which controls these facts, the prisoner is guilty. But here, the Jury find the prisoner guilty.

[10.] During the progress of this case, and after Wm. H. Thomas, one of the Jurors sworn in chief had been accepted and qualified, Joseph W. George was challenged by the prisoner, and the Court directed him to be put upon Joseph Walters and John Rogers as triors, they being by-standers and not having been sworn of the Jury, without joining the Juror Thomas with them. This course is not sanctioned by what appears to be a well settled practice, and the Court below erred therein.

If the challenge "be made to the first Juror, and of course before any one is sworn, then the Court will direct two indifferent persons to try the question; and if they find the party challenged indifferent, he will be sworn and join with the triors in determining the next challenge. But when two Jurors have been found impartial and have been sworn, then the office

McGuffie *vs.* The State.

of the triors will cease, &c. (1 Ch. Cr. L. 549. Ca. Litt. 158. 8 Bac. Abr. Juries, E. 12. Williams, J. Juries, V.)

[11.] The Court also erred in refusing to grant a new trial on account of the expression of opinion by Rufus R. Bunce, one of the Jurors who had tried the prisoner.

This Juror had heard a portion of the testimony as it was delivered at the first trial. He had subsequently expressed the opinion to several persons, that the prisoner was guilty. And in his statement vindicating himself, he said that he had formed a decided opinion. He was thus disqualified by the express provisions of our law.

We have never decided that a Juror so disqualified might show himself competent by swearing, that notwithstanding such expression of opinion, &c. he felt that he was able to render a fair and impartial verdict, or that he had rendered such verdict. And especially did we not so decide in the case of *John Anderson vs. The State*, (14 Ga. 709.) That case, and all others should be considered *secundem subjectam materiam*. There the Juror had expressed an opinion from rumor. And we held that the effect of his affidavit was to show, that the opinion formed and expressed by him under these circumstances, was not a fixed opinion; that it may have yielded and did give way, probably, to the force of the testimony when heard by him upon oath, and that he was therefore a competent Juror, and would so have been pronounced if he had been challenged on this account when first called up, and had been put upon triors.

[12.] When instructing the Jury in this case his Honor, the Judge, was requested to charge, that in criminal cases the Jury "are judges, both of the law and the facts, and have the legal right, both to construe the law and apply the facts;" which charge was given, but the Court added, "the law as given you in charge by the Court."

I have carefully considered this subject. I have looked into all the cases that I can find, in which it is discussed, and the result is, that I have been induced, by the reasoning of Mr Justice Best, in *Rex vs. Burdett*, (4 Barn. & Ald. 95,) and of

McGuffie *vs.* The State.

Judge *Kent*, in the case of *The People vs. Croswell*, (3 John. Cas. 337,) to modify the opinion I expressed on this point when the judgment was delivered; and I am now satisfied that in criminal cases, the Jury may be said to be judges of the law as well as of the facts, because the law gives to them the privilege of acquitting the prisoner, although the Judge may tell them, that according to law, if they find certain facts to be proven, he is guilty, and although they may find such facts to be proven; and this, their verdict, is final and conclusive. In this sense, it is legal for them to find a verdict contrary to the charge, and I am constrained to agree with Judge *Kent*, in admitting that it cannot accurately be said that they would do wrong in exercising a privilege which, by law, is granted to them. I am not prepared to say, consequently, that the Legislature has granted to them a lawful privilege, which is not a rightful power.

I defer, therefore, to the view of this subject taken by my brethren, and agree that they were right in holding that the Court below erred in restricting the Jury as he did on this point, to the law "as given them in charge by the Court." He might have called their attention to the fact, that the Judge, by his education and position, was better skilled in the law than themselves as the general rule, and might be looked to by them as a reliable and proper adviser; still, he should have added, that though, according to his view of the law, the prisoner might be guilty; yet, if they took a view of that law different from himself and deemed the prisoner innocent, they had the legal right so to find him.

[13.] The charge of the Court, in our opinion, was otherwise defective, and may have been prejudicial to the rights of the prisoner.

The Court instructed the Jury, among other things, that "if the prisoner raised and pointed the loaded gun at deceased, within a distance which the gun would carry, this act was an assault, and the deceased was justified in making resistance. That if the prisoner presented a loaded gun at the deceased,

McGuffie vs. The State.

within distance that the gun would carry, deceased was justified in throwing a brick-bat at the prisoner, and the throwing of said brick-bat cannot be urged as any mitigation of the prisoner's conduct in continuing the difficulty. If, in such case, the prisoner presented a loaded gun with evil intention, provided it was done with malice aforethought, and the deceased threw a brick-bat at him, and then the prisoner shot him, it is murder. Such a case shows that the prisoner began the difficulty, and the deceased did no illegal act in throwing the brick-bat."

Taking this part of the charge as a whole, we are satisfied that it was of a character too much to limit the Jury in determining whether or not this crime was murder or voluntary manslaughter.

Mr. Loring, a witness for the State, testified that after the prisoner had presented his gun at the deceased, and had taken it down at the instance of some of the by-standers, the decedent said to him, "if you raise that gun again, I will throw a brick-bat at you, the prisoner raised his gun again, and deceased threw the brick-bat at him, and then deceased jumped over the hack" of bricks, &c. Again he says: "when prisoner first put the gun to his face, deceased was standing in the crowd; when deceased threw the brick-bat at prisoner he jumped over the hack, and was in the act of picking up another brick, when prisoner walked round the end of the hack, fifteen or twenty feet, and shot him," &c.

Now let us suppose, that after the prisoner had presented his gun at the decedent, even though he had done so with malicious intent to shoot him, he had desisted at the instance of the by-standers, and would not again have pointed the same at decedent or have fired on him, if the latter had not said what he did, and had not thrown the brick-bat.

We will see from the above statement, that it was possible the prisoner might not again have presented his gun, but for what he may have regarded as the bantering words of the decedent, nor have fired at him, but for the throwing of the brick-bat. If so, the crime may have been no more than voluntary

Janes et al. vs. Trust. Mer. Un.

manslaughter. This was clearly possible; and yet, the charge of the Court assumed, that if the prisoner had thus, in the outset, presented the gun with malicious intent, notwithstanding what followed, the killing was murder.

We mean to express no opinion upon the evidence. We do not wish to be understood as intimating that this crime did not amount to murder. We only desire to say, that it was the province of the Jury to determine this (they might possibly have found the same verdict, if the charge had been correct in this respect) and that they may have been prevented by the charge of the Court from giving due weight and consideration to circumstances, the effect of which, on their minds, might have been to show that the prisoner would not have fired on the decedent when he did, if he had not been provoked by the language and conduct of the former; and that it was possible they might have regarded the throwing of the brick-bat as such an assault as would have reduced the crime from murder to manslaughter.

Let the judgment be reversed.

No. 87.—WILLIAM F. JANES *et al.* plaintiffs in error, *vs.* THE TRUSTEES OF THE MERCER UNIVERSITY, defendants in error.

- [1.] A party to a suit is not a competent witness for himself.
- [2.] It behooves him who alleges a person to be incompetent as a witness, from interest, to show the interest.
- [2.] Representations which do not appear to have been heard, or to have been acted on by a party, can constitute no ground of defence or of action for that party.
- [4.] If, on application to a person for a donation to a school, it is represented to him that the school is to be a manual labor school, and he agrees, on that representation, to make a donation, and afterwards, the manual labor

Janes *et al. vs. Trust. Mer. Un.*

part of the school is abolished, the representation is a fraud on him, and he is not bound to make the donation.

Assumpsit, &c. in Polk Superior Court. Tried before Judge IRWIN, March Term, 1854.

The trustees of Mercer University commenced suit against the executors of Thomas G. Janes, upon the following instrument:

“\$1.000. In consideration of the importance of literary and religious institutions to the well-being of society, I hereby promise to pay the Treasurer of the Ga. Baptist Convention, or bearer, for the use of the Mercer University, Two Hundred Dollars on the 1st January, 1838; Two Hundred Dollars on the 1st January, 1839; Two Hundred on the 1st January, 1840; Two Hundred Dollars 1st January, 1841; Two Hundred Dollars 1st January, 1842, for the faithful payment of which I hereby bind myself, my heirs and assigns. Oct. 30th, 1837.

(Signed)

THOS. G. JANES.”

The defence set up was a failure of consideration; and also a material alteration in the contract in this: that the agreement and understanding was, the subscription of Thos. G. Janes was for a manual labor institution, and that without his consent the manual labor feature had been abolished in the Mercer University.

George W. West, one of the executors of Janes, pleaded *puis darrein continuance*, a dismission from the Ordinary from his trust as executor, and now moved to be dismissed from this suit, or that his plea be first tried, as he was a material witness for defendants. All of which was refused by the Court. After the letters dism issory were in evidence, the other defendants offered George W. West as a witness. The Court refused to admit him as a witness, and this decision is assigned as error.

The plaintiffs below offered in evidence the depositions of B. M. Sanders and Thomas J. Burney; to which defendants

Janes *et al.* vs. Trust. Mer. Un.

objected, on the ground that they were officers of Mercer University; and it appeared, from the depositions themselves, that this money, if collected, would constitute a part of a fund, the interest of which was applied to the payment of their salaries. The Court over-ruled the objection, and this is assigned as error.

Defendants proposed to prove by several witnesses, that before and at the time the note sued on was given (for the purpose of showing that the note was fraudulently procured), that Charles D. Mallory and other agents of the said institution, fraudulently represented to the community, from the pulpit and other public meetings, and privately, that the funds to be raised from subscribers (of whom Janes was one), were to constitute a fund to support a manual labor school; which testimony was rejected by the Court, on the ground that it did not appear that these representations were made in the presence or hearing of Janes. This decision is assigned as error.

There was a good deal of evidence introduced, showing that the university at first included the manual labor feature, which was abandoned in 1844, without the consent of T. G. Janes. The Court charged the Jury, that the character and object of the contract must be ascertained from the writing—all parol negotiations being merged therein, and the contract cannot be added to or varied by parol.

Defendant's Counsel requested the Court to charge—

1st. That if the Jury find that the school now in use is different, materially, from the one to which the defendant's testator subscribed, and without his consent, the defendants are not bound to pay this subscription.

2d. If the note was procured by representations that this was to be a manual labor institution, and he subscribed upon that representation, and the manual labor department was abolished, it was a fraud on his rights, and the defendants are not bound to pay.

3d. That if testator signed the instrument sued on for the benefit of the Mercer University, and at the time he signed the

Janes *et al.* vs. Trust. Mer. Un.

same it was a manual labor school, and that the same has been altered in a material part without his consent, the estate of testator is relieved.

The Court declined so to charge, but instructed the Jury—that they must look to the contract under the legal rules laid down by the Court, and if they should find a material alteration in that, then the defendant's testator was discharged; that the abolition of the manual labor feature was not such a material alteration, unless it was in violation of the contract of the parties as contained in the instrument sued on; that fraud was never presumed, but must be proven; yet, it may be proven by circumstantial evidence; that the Jury must look to the contract to ascertain the object of the subscription or donation; and if a material alteration has been made, after the making of the contract, without the consent of Thomas G. Janes, he was discharged; but if, from the evidence, the Jury should find that the subscription was made in consideration of the importance of religious and literary institutions to the well-being of society, their abolishing the manual labor feature, if it was proved, was not such a material alteration, in the opinion of the Court, as would discharge the defendant, unless it was detrimental to Janes or some of the objects of the subscription—all of which were facts to be determined by the Jury and submitted to them."

All of which charge and refusal to charge are assigned as error.

UNDERWOOD & MITCHELL, for plaintiffs in error.

ALEXANDER and McDONALD, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

As long as the plea, *puis darrein continuance* of Geo. W. West remained undisposed of, he continued a party to the suit. That plea was not disposed of when he was offered as a wit-

Janes *et al.* vs. Trust. Mer. Un.

ness. He was therefore, when offered as a witness, a party to the suit.

[1.] And a party to a suit is not a competent witness for himself.

It does not appear that the payment of the salaries of Sanders and Burney was at all dependent on the result of the suit. For aught that appears to the contrary, the interest of the fund already in hand was sufficient to pay them their salaries. It does not appear, therefore, that they were to gain or to lose anything by the verdict, go as it might.

[2.] And unless interest be made to appear in the person offered as a witness, it is to be presumed that interest does not exist.

[3.] It does not appear that Thomas G. Janes heard the representations made by Mallory and the other agents of the Mercer University, that the sums which might be subscribed were to constitute a fund to support a manual labor school. But unless he heard those representations and acted on them, it is manifest that they can constitute for him no ground of defence.

One of the requests to charge was as follows: "If the note was procured by representations that this was to be a manual labor institution and he subscribed upon that representation, and the manual labor department was abolished, it was a fraud on his rights, and the defendants are not bound to pay."

Fraud vitiates all contracts—much more will fraud vitiate all mere donations. Fraud may consist in false representations. (1 *Story's Eq.* §191.) To make a misrepresentation fraudulent, *Story* says: "the misrepresentation must be of something material—constituting an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury." (§195 *Story's Eq.* *Id.* §191.)

Now if the manual labor feature in a manual labor school be not a material feature of such a school, it is difficult to say what is. It is *the* feature of such a school.

[4.] When, therefore, on application to one for a donation to such a school, a representation is made to him that the school is to be a manual labor school, the representation is one

Janes *et al.* vs. Trust. Mer. Un.

of a material kind. If, therefore, the representation be acted upon and a donation made, and then the manual labor part of the school be abolished, an injury, by means of the false representation, is inflicted on the donor. He is deprived of his money. The transaction amounts to a fraud on him.

Numerous analogies to frauds of this sort are to be seen in the cases of part performance of contracts which are within the Statute of Frauds. One party, after he has allowed the other party to perform a contract which is forbidden by the Statute of Frauds, is not permitted to plead that Statute as an excuse for not performing the contract on his part. And why? because, to permit him so to plead the Statute, would be to permit him to perpetrate a fraud on the other party. The subsequent matter of a disposition or offer to plead the Statute is considered as having relation back to the time of the making of the contract, and to be evidence of an original intention to deceive; an original intention to use the Statute as an engine of fraud.

So, here, the abolition of the manual labor branch of the school, subsequently to the time of procuring this donation, may be considered as having relation back to that time, and as being evidence tending to show an intention then existing, to effect the abolition of that branch, by means of representation that it was to be permanent, should have been made to subserve a purpose—that of procuring donations to the school.

And that these representations were not put in the writing, made no difference. Parol evidence is admissible to show fraud in the procuring of a written contract. No rule is better established than this. (3 *Phill. Ev. (notes)* 1475.)

This request, then, in the opinion of this Court, was proper; and the Court below should have charged in accordance with it.

I incline, myself, very much, to think that if, at the time when this subscription was made, the Mercer University, for whose use it was expressly made, was a manual labor school, the subsequent abolition of the manual labor department was, of itself, sufficient to release the subscriber from his subscrip-

Taylor et al. vs. Johnson, Gov. for use, &c.

tion. In such a case the subscription, by its very terms, would be for the use, alone, of that which was a manual labor school. How, then, according to the strict terms of the contract, could the subscription be called for to be applied to any other use than that of a manual labor school?

How is such a case to be distinguished from that of Winter vs. *The Mosegee Rail Road Company*, (11 Ga., R.) In that case, the corporation, after obtaining Winter's subscription for a portion of its stock, changed the course of the road without his consent. And it was held that this released Winter from his subscription. Should a person who is a voluntary contributor to a corporation, be in a worse situation than one who is a contributor for value; that is, for stock in the corporation? I do not see why he should be.

Be this, however, as it may, this Court is of opinion, that taking the representations into the account, the Court below should at least have given the request aforesaid, already noticed, in charge to the Jury. And therefore, it is of opinion that there should be a new trial.

No. 88.—JEREMIAH TAYLOR AND OTHERS, plaintiffs in error,
vs. JOHNSON, Governor, for the use of A. W. & W. P. CAR-
MICHAEL, defendants.

[1.] Under the Acts of 1799, 1803 and 1845, is it the duty of the Judge of the Superior Courts to examine into the solvency as well as the legality of the Sheriff's bonds? *Quere.*

[2.] If a bond be executed by H H & Co. as securities for T, and the bond is rejected by the officer appointed to take it, and afterwards, and without the knowledge of the previous securities, the name of W be added to the bond, and the officer then accept it, is it void as to H H & Co.? *Quere.*

Taylor et al. vs. Johnson, Gov. for use, &c.

- [3.] The liability of a surety cannot be extended beyond the actual terms of his engagement, and will be extinguished by any act or omission which affects the terms of the contract, unless it be with his consent.
- [4.] It matters not whether the alteration in the contract be for the benefit of the surety or not, he has a right to stand upon the very terms of his agreement.
- [5.] The only question in all such cases is, has the identity of the contract been destroyed? And would the plea of *necessus factum* be overruled on demurrer, on the ground that the bond remained the same?
- [6.] Several plaintiffs in *s. fa.* having distinct interests, may unite in a motion against the Sheriff.
- [7.] A rule absolute against the Sheriff, is conclusive against him, and *prima facie* evidence against his securities.
- [8.] The rule, that the whole sum must be given, is never applied to an action of debt upon the Sheriff's bond, and that it is only in debt for an escape on execution, under the English Statutes of *Edward* and *Richard*, that the measure of damages is the amount of the debt, without abatement on account of the poverty of the defendant or of any other circumstance.
- [9.] The object of our law in requiring the Sheriff to give bond, and prescribing its conditions, was to provide, in addition to other remedies, more ample security to all persons interested in its faithful performance.
- [10.] It was not intended to increase the Sheriff's obligations or to render a more summary redress for his defalcations than existed by action on the case at Common Law; and therefore, not to conclude him from any defense which he had in that action.
- [11.] The action of debt on the Sheriff's bond, is neither the remedy granted by the Statutes of *Edward* and *Richard* nor the Common Law action on the case. It is an action of debt on a statutory bond, with a collateral condition annexed, and a penalty prescribed for its violation.
- [12.] At Common Law the whole penalty was recoverable. To remedy this hardship and to render a resort to Equity unnecessary, *6 and 9 William III. ch. 2* was passed; and that Statute has been adopted in Georgia.
- [13.] Under provisions of this Statute the defendant is liable to no greater damages than the plaintiff has sustained, to be ascertained by the verdict, after a full investigation of all the facts.

Debt, in Habersham Superior Court. Tried before Judge JACKSON, October Term, 1854.

This was an action, brought by the Governor for the use of A. W. & W. P. Carmichael against Jeremiah Taylor late Sheriff, and Thos. J. Hughes, Peter B. Haralson, James Colley and

Taylor et al. vs. Johnson, Gov. for see, &c.

Archer Whitehead, his securities, for a breach of his official bond. The declaration contained two counts—one founded on a rule absolute obtained against the Sheriff at a previous term of the Court, commanding him to pay over money to the plaintiffs, and which he had not obeyed; and the other setting forth a breach of his bond, in not selling certain property of John B. Fields and Peter B. Haralson, levied on by him, in obedience to a writ of *f. fa.* against them in favor of plaintiffs; and that he had failed to make the money on said *f. fa.* or to return the same in the time prescribed by law.

Defendants pleaded, that since the granting the rule absolute, the property levied on had been sold and the proceeds distributed between this and other *f. fas.*; that the defendants in *f. fa.* had no other property and were insolvent; and that plaintiffs had not been damaged.

The plaintiffs offered in evidence the Sheriff's bond, in the usual form, and signed by all the parties, dated 2d February, 1852, attested as follows:

"Tested and approved by

THOMAS B. WHEELER, J. L. C.

JAMES GRIGGS, J. I. C.

MOSES AYERS, J. I. C."

"Signed by Archer Whitehead, in my presence, 17th April, 1852. PHILIP MARTIN, C. S. C."

On the bond was this entry:

"Examined and approved, upon Archer Whitehead signing as additional security, in presence of the Clerk of the Superior Court, and ordered to be entered on the minutes, April 17th, 1852. JAMES JACKSON, J. S. C. W. C."

The defendants objected to the admission of the bond in evidence, on the ground, that by the Act of Dec. 26, 1845, the Court was not authorized to strengthen the bond, by requiring another name to be signed to it; and the bond so altered could not bind either the former securities or the one then signing.

Taylor et al. vs. Johnson, Gov. for use, &c.

The Court overruled the objection and admitted the bond in evidence; and this decision is assigned as error.

The plaintiffs introduced the original declaration and judgment, and then a *fi. fa.* in their favor against Peter B. Haralson and John D. Field, for the sum of \$136⁸⁴₀₀.

On the *fi. fa.* were the following entries:

"25th February, 1853. Levied this *fi. fa.* on lot of land No. 39, in the 2d district of Habersham County, containing 245 acres, more or less, the place whereon defendant, Haralson, now lives, and whereon is situated the store-house occupied by said Haralson, in the village of Mount Yonah; and lot of land No. 15, in the 2d district of said county; 250 acres, more or less, known as the Boyd place, as Field's property, and 126 acres, more or less, of lot No. not known, in the 2d district of said county, improved, known as the Joe Hunt place; and part of lot of land No. 62, in the 2d district of said county; 215 acres, more or less, the place whereon Elisha Cannon now lives. Pointed out by P. B. Haralson."

J. TAYLOR, Sh'f."

"4th October, 1853. All the above land sold according to law to Robert McMillan for Two Hundred and Ten Dollars; and after paying all the cost, including levy, sale and advertising fees of this and eleven other *fi. fas.* hereinafter named, leaves a balance of Thirty-two Dollars to be credited *pro rata* on this *fi. fa.* and two in favor of Force, Conley & Co.; one in favor of Wm. E. Jackson & Co.; one A. W. & W. P. Carmichael; one G. W. Ferry & Co.; one B. W. Force, J. P. Force & Benjamin Conley, survivors of L. M. & B. W. Force & Co.; two, Dunham & Bleakly; one, Snowden & Shear; one A. P. Dearing, Agent, &c.; one Carmichael & Bean; one Baker & Wilcox. All of said *fi. fas.* issued from the Superior Court of said county, against Peter B. Haralson & John D. Field; *pro rata* share of this *fi. fa.* being one dollar and twenty-three cents."

J. TAYLOR, Sh'f."

Taylor et al. vs. Johnson, Gov. for use, &c.

Received of J. Taylor, Sheriff, my cost, October 18, 1853:
PHILIP MARTIN, C. S. C."

The plaintiff then offered in evidence a *rule nisi*, of which the following is a copy:

L. M. & B. W. Force & Co. vs. Peter B. Haralson and John D' Field.

Wm. E. Jackson & Co. vs. the same defendants.

Force, Conley & Co. vs. the same defendants.

The same vs. the same.

Dunham & Bleakly vs. the same defendants.

The same vs. the same.

A. W. & W. P. Carmichael vs. the same defendants.

Carmichael & Bean vs. the same defendants

A. P. Dearing, Agent, vs. the same defendants.

G. W. Farzy & Co. vs. the same defendants.

John R. Stanford vs. Gabriel Sisk.

Pitner & England, use of Gould, Bulkly & Co. vs. John C. Addison and John H. Wyly, security.

Ramey & Story vs. George Mills.

Joseph Scales vs. James McCracken.

Horsey, Ives & Co. vs. Thomas M. Alston.

All the foregoing being *f. f. s.* from Habersham Superior Court, it is ordered by the Court that Jeremiah Taylor, Sheriff of said county, return said *f. f. s.* into Court with his actings and doings thereon, and show cause by this day at twelve o'clock, or so soon thereafter as Counsel can be heard, why he does not pay over to the several plaintiffs hereinbefore specified, or their Attorney, the several sums of money due to each of them, respectively, on said *f. f. s.*

JOHN R. STANFORD, Plffs' Att'y.

A true transcript from the minutes of Habersham Superior Court, April Term, 1853.

PHILIP MARTIN, C. S. C.

To the admission of this paper in evidence defendants object.

Taylor et al. vs. Johnson, Gov. for use, &c.

ed, on the ground that several *f. fa.*, especially when in favor of different plaintiffs and against different defendants, could not properly be included in one and the same rule.

The Court over-ruled this objection and admitted the testimony; whereupon, defendants, by their Counsel, excepted.

Plaintiff then offered a rule absolute, taken at the same term of the Court, which, after reciting the rule *nisi*, including the statement of the same *f. fa.* and stating that the Sheriff had shown no cause, went on to order, that the Sheriff do pay to the several plaintiffs in *f. fa.* certain named sums of money, among which was the sum of one hundred and forty dollars and twenty-five cents to the present plaintiffs.

To this paper defendants made the same objection and on the same grounds taken to the rule *nisi*; and being over-ruled by the Court they excepted.

The plaintiffs here closed their case.

Defendants introduced sundry *f. fas.* against Peter B. Haralson and John D. Field, in favor of various plaintiffs, on which there was due and unpaid about three thousand dollars, and of the same date with the *f. fa.* of the present plaintiffs; and a *f. fa.* against Haralson for about four hundred dollars, of older date.

It was shown, also, that on eight of these *f. fas.* amounting to about three thousand dollars, suits were now pending against them in Court, or the Sheriff's bond.

Defendants then introduced, as a witness, William A. Hunt, who testified that the property levied on under the *f. fa.* of plaintiffs, in February, 1853, was all that he knew the defendants in *f. fa.* to have at that time, except a cow or two that were supposed to be running in the mountains, and a few hogs in the woods, not, in all, amounting to more property than is allowed to defendants under the Exempting Law; that in the fall of 1852 the defendants in *f. fa.* had a store at Mt. Yonah, containing a stock of goods worth, then, perhaps, several hundred dollars; that this stock was very much reduced by the latter part of the winter, being then a mere remnant; that

Taylor et al. vs. Johnson, Gov. for use, &c.

such property as that levied on was rising in value from February to October, A. D. 1858.

They also introduced Edward Ferguson, who testified that he was acquainted with defendants in *s. fa.* in 1858, and knew them to have no property but what was levied on, and that property of the sort levied on was generally rising, from February to October in that year.

Counsel for defendants requested the Court to charge, that if all the property of defendants in *s. fa.* subject to levy and sale, had been actually levied on by the Sheriff and ultimately sold, these defendants, or at least those of them who were securities, could only be liable for the actual loss arising to plaintiffs in consequence of the delay of the sale; that the sale absolute against the Sheriff was no evidence against the securities; that if the Jury believed, from the evidence, that the defendants in *s. fa.* were insolvent at the time the *s. fa.* were in the hands of the Sheriff, or that all their property in the county, subject to levy and sale, had been sold under the *s. fa.* of plaintiffs or other *s. fas.* and applied to the payment of judgments against them according to their legal priority, before the institution of this suit, the Jury would be authorized either to find for the defendants or to reduce the damages to the amount of injury actually sustained by the plaintiffs in *s. fa.* in consequence of the neglect or misconduct of the Sheriff; or, if the Jury should believe, from the evidence, that any property of the defendants in *s. fa.* had been unsold, they might increase the verdict by such an amount as the *s. fa.* of plaintiffs would be entitled to, of the proceeds of such property, if brought to sale.

This charge the Court refused to give, but charged the Jury as follows:

"That the rule absolute was *conclusive* evidence against the Sheriff, and *prima facie* evidence against the securities; that hence, the securities could protect themselves in this suit upon their bond, by any defence which would have availed the Sheriff in reply to the rule absolute. The question then was

Taylor et al. v. Johnson, Gov. for use, &c.

arrived to this: would the facts now proved by the securities, that the property was levied on by the Sheriff prior to the granting of the rule nisi, but was sold until two terms of the Court had elapsed, and the rule nisi and absolute had both been granted, and that the Sheriff had in his hands the other *f. fee.* in evidence before the Jury, have been a good and sufficient reply to the rule absolute by the Sheriff? If so, they would protect the securities now; if not, they afforded no protection to the securities now. In the judgment of the Court, they could not have protected the Sheriff in reply to the rule, and therefore, were no protection to the securities in this suit upon their bond, notwithstanding the subsequent sale of the property levied on, and the distribution of the proceeds thereof to the other *f. fee.*; and hence, it was the duty of the Jury to find for the plaintiffs, with interest and costs; and that the true measure of damages was the amount of the debt, with interest, at twenty per cent. from the date of the rule—and they must so find under this law of the case."

To which charge and refusal to charge defendants excepted.
The Jury returned a verdict for plaintiffs for One Hundred and Forty Dollars and Twenty-five Cents, principal, with interest thereon, at twenty per cent. from the 14th day of May, 1858, with costs of suit.
And the Counsel for defendants excepted, on the following grounds:

- First. That the Court erred in over-ruling the objection made by defendants to the admission of the paper purporting to be a Sheriff's bond in evidence.
- Second. That the Court erred in allowing the rule *nisi* tendered by plaintiffs to go in evidence.
- Third. That the Court erred in allowing the rule *absolute* to go in evidence.
- Fourth. That the Court erred in refusing to charge as requested by defendants.
- Fifth. That the Court erred in charging that the sub-al-

Taylor et al. vs. Johnson, Gov. for use, &c.

late was conclusive evidence against the Sheriff, and *prima facie* evidence against the securities.

Sixth. That the Court erred in charging that the Sheriff's securities could make no defence to this suit that the Sheriff could not have made to the rule nisi.

Seventh. That the Court erred in charging that the debt of plaintiffs was the measure of damages, and that the Jury must find that amount for plaintiffs.

Eighth. That the Court erred in charging the Jury that the facts proved in this case constituted no defence for the Sheriff or his securities, either in bar or in mitigation of damages.

ACKERMAN; COBB & HULL, for plaintiffs in error.

STANFORD, for defendants.

• *By the Court.*—LUMPKIN, J. delivering the opinion.

[1.] Every point in this case is encompassed, more or less, with doubt and difficulty—perhaps none more so than the first.

Jeremiah Taylor having been elected Sheriff of Habersham County the first of January, 1852, on the fifth day of February next ensuing, gave bond for the faithful performance of the duties of his office, with Thos. J. Hughes, P. B. Haralson, James Colly and R. Nash as his securities. The bond was attested and approved by three Justices of the Inferior Court.

On the 17th day of April thereafter, being the first sitting of the Superior Court for that county after the election and qualification of Taylor, Judge JACKSON examined the bond, as it was made his duty to do, under the law, and passed the following order: "Examined and approved by Archer Whitehead's signing as additional security, in presence of the Clerk of the Superior Court." And this was done, as appears by the official attestation of that officer.

The action against the Sheriff and his securities, for the official misconduct of the Sheriff was brought upon this bond;

Taylor et al. vs. Johnson, Gov. for use, &c.

and when the bond was offered in evidence, it was objected upon the grounds—1st. That by the Act of December 26, 1845, the Judge of the Superior Court was not authorized to strengthen the Sheriff's bond, by requiring another name to be signed to it—and 2dly. That the bond, so altered, could not bind either the old or the super-added security.

The first question necessarily involves a construction of the Act of 1845—and in order to do this intelligibly, it becomes necessary to glance briefly at our previous legislation upon the same subject.

The Act of 1799 (*Cobb's Digest* 57, 45) declares, "That the Sheriffs of the several counties shall attend the Superior and Inferior Courts in the respective counties when sitting, and by themselves or deputies, execute throughout the counties all writs, warrants, precepts and processes directed to them, under the authority of any Judge or Justice of the said Superior or Inferior Courts, or the Clerk of either of the Courts; and the said Sheriffs or their deputies shall have power to command all necessary assistance in the execution of their duty; and to appoint, as there shall be occasion, one or more deputies; and before any Sheriff shall enter upon the duty of his appointment, and being commissioned by the Governor, he shall be bound for the faithful performance of his duty, by himself and his deputies, before any one of the said Judges, to the Governor of the State, for the time being, and to his successors in office, jointly and severally, with two good and sufficient securities, inhabitants and free-holders of the county, to be approved of by the Justices of the Inferior Court or any three of them, in the sum of \$20,000; and the said bond shall remain in the office of the Clerk of the Superior Court of such county, and may be sued for by order of said Court, for the satisfaction of the public or persons aggrieved by the misconduct of the Sheriff or his deputy," &c

In 1803; doubts having arisen as to who was the proper person authorized and intended by the foregoing act, to take the bonds and obligations of Sheriffs, a declaratory Statute was passed, (a very common sort of legislation in this State) to the effect: "That any Judge of the Superior or a majority of the

Taylor et al. vs. Johnson, Gov. for use, &c.

Justices of the Inferior Courts of the respective counties throughout this State, is and are, and by intendment of law, ought to have been taken, held, deemed and considered as competent in law to take the bonds or the obligations of Sheriffs and to qualify them as by law directed." (*Cobb's Digest*, 199.)

By a careful perusal of the Act of 1799 and 1803, it will be seen that the doubts which arose under the former of those Statutes and the remedy provided by the latter for their removal, related exclusively to the question as to who should take Sheriff's bonds; and the law directed that either the Judges of the Superior or the Justices of the Inferior Courts, or a majority of them, might perform this service. And by scrutinizing the Act of 1799 closely, does it not seem plain that no matter by whom the bond was taken, the security was to be approved by the Justices of the Inferior Court or a majority of them? To secure its legal execution, the duty of taking it might well have been confided to the Judges of the Superior Courts. At the same time, it must be admitted, that the Justices of the Inferior Courts of the respective counties are better qualified, by their local knowledge, to judge of the sufficiency of the security.

With this passing remark upon the previous Statutes, we come to the Act of 1845. It purports to be "An Act to alter and amend the several Acts then in force in relation to the taking of Sheriff's bonds," and declares, that "From and after its passage, it shall be the duty of the Judges of the Superior Courts of this State, at the first sitting of the Superior Court in any county, after a Sheriff shall have been elected and qualified for such Courts, to examine the official bond of such Sheriff; and if the bond has not been taken in conformity to the law, it shall be the duty of the Sheriff to give another (?) bond in conformity to the law—which bond the Judge is hereby authorized and empowered to take; and when so taken, shall be entered on the minutes of the Superior Court." (*Cobb's Digest*, 217).

Did the Legislature, by this Act, intend to confer upon the

Taylor *et al.* vs. Johnson, Gov. for use, &c.

Judges of the Superior Courts the power of examining into the solvency as well as the legality of Sheriff's bonds?

We cannot resist the conviction, from the phraseology of this Statute as well as its predecessors of 1799 and 1803, that it was designed to delegate to the Judges of the Superior Courts the duty of supervising the formal execution of Sheriff's bonds, leaving it to the Inferior Courts, as before, to take care of their solvency. The Judges, says the Act, are to examine the bonds to ascertain—what? Whether the security is sufficient? No, but whether they have been taken "*in conformity to the law.*" What was the mischief? Not that the public had suffered on account of the insolvency of Sheriff's securities, but that they had escaped, by reason of some technical defect in these instruments. This was the evil intended to be remedied.

We know, however, that a different construction has been put upon this Act in some sections of the State; and contemporaneous construction, when it is general and uniform, should have some influence even in the interpretation of a recent Statute. Perhaps the General Assembly had better settle this difficulty definitely; and thus, save further litigation upon the point.

[2.] Conceding, however, that his Honor, Judge JACKSON, was authorized to act in the premises, what is the effect of the change made in this instrument? The Act requires that *another* bond be taken in conformity to the law. Here an additional security was added to the old bond, without the privity or consent of the former securities.

Respectable authority may be found on both sides of this question. The case in *Levinz*, p. 35, establishes, that after the delivery of a bond a new obligor may be added in this way, without avoiding the instrument as to any previous party. Chief Baron *Gilbert* in treating on this topic observes, "but if any material part of the contract be altered, after sealing and delivery—as if A, with a blank left after his name, be bound to B, and after, C is added as a joint obligor, this does not avoid the bond; for he was bound to pay the whole money, without such

Taylor et al. vs. Johnson, Gov. for use, &c.

addition." (*1 Loft's Gilbert*, 111.) And the case of *Yonah vs. Clay*, which the author quotes as reported in *Ventriss*, 185, undoubtedly sustains the doctrine; for there, the Court overruled the plea of *non est factum*, on the ground that the bond remained the same as to the previous obligor. And the note at the end of *Pigot's case*, (11 Coke,) also recognizes this principle.

But in *O'Neale vs. Long*, (4 Cranch, 59.), the Supreme Court of the United States held, that if a bond is executed by O, as security for S, to obtain an appeal from the judgment of a Justice of the Peace, and the bond is rejected by the Justice; and afterwards, and without the knowledge of O, the name of W be interlined as an obligor, who executes the bond, and the Justice then accepts it, it is void as to O.

Mr. P. B. Key contended, in the first place, that the deed was void by the alteration in a matter essential; thereby making it the deed of four when it was only the deed of three persons; and that it was immaterial whether the alteration was for the benefit of the obligor or not, the only question in all such cases being, whether the deed be substantially varied. He insisted, secondly, upon the authority of *Whelpdale's case*, (5 Coke, 19 b,) that after the rejection of the bond by the Justice, it could not be again set up without a new delivery; that the Justice was substituted, by the law, for the obligee, and that his rejection is equally fatal as if the bond had been tendered to and refused by the obligee himself. (*Step. Touchstone*, 70.)

Mr. Mason, on the contrary, argued that the alteration did not vary the deed, as it was obviously for the benefit of the defendant; that it was not the less the deed of the defendant because it became the deed of another; that it was in the nature of a judicial proceeding and not a mere matter of contract between man and man. It is a security required by law in a civil action.

Chief J. Marshall, who delivered the opinion of the Court, stated, "that the Judges did not agree upon the same ground, some being of the opinion that the bond was void by reason of

Taylor *et al.* vs. Johnson, Gov. for use, &c.

the alteration; and others, that it was vacated by the rejection of the Magistrate, and could not be set up again without a new delivery—but that all agreed that the bond was void."

Two cases more perfectly parallel could not well be imagined.

[3.] [4.] The rule of law is ~~not~~ disputed, that the liability of a surety cannot be extended beyond the actual terms of his engagement; and that his liability will be extinguished by any act or omission which alters the terms of the contract, unless it be with his consent. And for myself, I am satisfied that the uniform doctrine of the books, supported by numerous decisions, is, that it matters not that the alteration be for the benefit of the surety, because he has a right to stand upon the very terms of his agreement. And it is no answer to a surety to say that the alteration is not material. He has a right to determine for himself, whether he will or will not consent to the alteration—whether *he thinks* it material or immaterial. No power of man can alter his engagement, and his liability be retained. He has a right to stand upon the very terms of his contract; and without his consent, any variation of it is fatal. The law will not allow others to speculate as to whether or not the alteration be to his prejudice. Adhere to this rule and the course of Courts is safe and simple. Depart from it and there is no limit—where will you stop? Who can tell what considerations influenced the first securities to enter into this undertaking with one another for Taylor? Pecuniary responsibility is not the only nor always the main motive which moves parties to unite in such an undertaking. Personal as well as pecuniary considerations have much to do with it. There may be rich men that would be willing to be bound with Taylor; and yet, Hughes and the other sureties might utterly object to such an association. Has not each co-obligor the right to select his fellow-bondsmen? Where the measure of damages is unsettled, the popularity of parties in a community will have its influence, justly or not, in the amounts for which verdicts are rendered. But I forbear to enlarge. Suretyships stand upon the exact agreement they have entered into, and

Taylor et al. vs. Johnson, Gov. for use, &c.

they would not stand without it. If it be a needful understanding which is doubted by many and positively forbidden by Scripture, it is at least always one of peril; and it most usually overtakes and overwhelms those whom we could most wish to see saved—the generous and the humane. That is a bad policy which would increase ~~the~~ dangers.

[5.] The only question then is, has the identity of the bond been destroyed? Would the plea of *non est factum* be overruled on demurrer, on the ground that the bond remained the same? We forbear to decide this question.

[6.] The plaintiff tendered in evidence a rule *nisi*, including sixteen cases, calling upon Taylor, the Sheriff, to return the *fas.* into Court with his actings and doings thereon; and to show cause why he did not pay over to the several plaintiffs therein specified, the amount of money due to each of them respectively, upon the executions.

To the admission of this paper in evidence defendants objected, on the ground that these various cases in favor of different plaintiffs and against different defendants, could not be included in the same rule. The Court over-ruled the objection and allowed the testimony to go to the Jury; and thereupon, defendants, by their Counsel, excepted.

The only authority read and relied upon in support of this exception is, the case of *Patterson et al. vs. The Officers of the Circuit Court of Mobile*, (11 Ala. R. 740.) The first head note is, that several plaintiffs having distinct interests, cannot unite in a motion against the Sheriff.

Without stopping to inquire whether or not the opinion of the Court justified this marginal proposition; we have only to say, that a contrary practice, founded in convenience, and attended with no practical evils, has obtained in all the Courts of all the Circuits in this State, time immemorially. And that we see no sufficient reason for departing from it at this late day. Any number of parties unite in a creditor's bill. And a money motion has always been analogized to a proceeding in Equity.

The same objection was taken to the rule absolute as that

Taylor et al. vs. Johnson, Gov. for use, &c.

alleged against the rule nisi, and was over-ruled by the Court, and the decision excepted-to.

We deem it unnecessary to repeat what we have already said upon this point.

[7.] The next question made by the record is, how far was the rule absolute taken against the Sheriff, evidence in the suit upon the bond against his securities? Counsel for the defendants insisted on its entire rejection: whereas, the other side maintained that it was conclusive as to the liability of the securities. The Court following the lead of most of the American cases and of this Court, took the middle ground, and charged that the rule absolute was *conclusive* against the Sheriff, and *prima facie* evidence against the securities.

After a careful re-consideration of the rule adopted by this Court upon this subject, we are disposed to adhere to it, although it is somewhat difficult to perceive upon what principle it rests. One thought is suggested by this record—there are two breaches assigned in the suit upon the bond—one, the failure or refusal of the Sheriff to obey the rule absolute ordering him to pay over the money; and the other, the neglect of the Sheriff to sell the property levied on according to law. Is not his disobedience to the rule absolute such “*official misconduct*” as constitutes a breach of the bond? And is not the judgment against him conclusive against the securities and every body else, of that fact? As to the quantum of damages assessable under this assignment, that is quite a different thing.

Mr. Justice Johnson, late of the Supreme Court Bench of the United States, said in one of his opinions, that Lord Coke “seldom let an opportunity escape him that furnished an apology for exemplifying his indefatigable research, and to make each case he reported authority for a score of positive decisions and the introduction to a mass of law upon questions totally distinct. And that his *Reports*, like the *Text of Littleton*, are only to be considered as the occasion or excuse for displaying his acquirements in the law learning of his day, and expressing his opinions upon judicial topics.”

If *Reports*, which have gone through some twenty English

Taylor et al. vs. Johnson, Gov. for use, &c.

editions, and *Commentaries*, which are styled the "Golden Book," "The Bulwark of the Law," &c. are thus criticised, I shall content myself with citing merely some of the leading cases upon this head. (See *Munford et al. vs. Overseers of the Poor of Nottaway*, 2 *Randolph's R.* 318. 1 *W&A. (Va.) R.* 81. 3 *Atkin.* 248. *Peak on Ev.* vol. I. p. 26. 4 *Monf.* 248. 10 *Viner's Ab.* 464. 1 *Greenlif. Ev.* §187. 12 *Wheat.* 515. 5 *Bimley,* 184. 6 *Ala. R.* 826. 2 *Leigh.* 898. 4 *Ohio,* 487. 4 *Monf.* 817. Note 3 to 4th. vol. of *Cowan & Hill's Notes to Phil. on Ev. Part II. 3d edition.*)

[8.] The last and main assignment of error is as to the rule prescribed by the Court as to the measure of damages in this case.

Judge JACKSON, under the decision of this Court in *Crawford, Gov. &c. vs. Wood, Wofford et al.* (7 *Ga. R.* 445,) charged the Jury, that the measure of damages was the amount of the plaintiff's debt, with interest and cost, and 20 per cent. damages, from the date of the rule absolute.

The facts in the case are these: On the 26th of October, 1852, a *fi. fa.*, at the instance of A. W. & W. P. Carmichael, the defendants in error, against Peter B. Haralson of Habersham and John D. Field of Lumpkin County, for the sum of \$186¹⁵, including interest and cost, was issued and delivered to Jeremiah Taylor the Sheriff of Habersham County; that on the 25th of February, 1853, Taylor levied upon lands of Haralson in Habersham County; that at the adjourned term of the Superior Court, held on the 13th day of May, 1853, the property being unsold and no return of *nulla bona* made as to either of the defendants, a rule absolute was obtained against the Sheriff ordering him to pay over, *instanter*, the money due upon the plaintiff's *fi. fa.*; that on the 4th of October, 1853, Taylor returned on the *fi. fa.* that he had sold the land for \$210, and that he had distributed the money to the plaintiff's execution and eleven others against the defendants, still making no return of no further property to be levied. And thereupon, on the 24th of February, 1854, the plaintiffs brought

Taylor et al. vs. Johnson, Gov. for use, &c.

their action of debt upon Taylor's official bond, against him and his securities.

The defendants proved that the proceeds of the property levied on had been distributed to the various *f. f. f. s.* according to their respective liens; that all of Haralson's property had been sold except a cow or two supposed to be running at large in the mountains and a few hogs in the woods, not amounting to more property than is allowed under the Exempting Law, in favor of poor debtors; that in the fall of 1852 defendant had a store at Mount Yonah; containing a stock of goods worth, perhaps, several hundred dollars; that the stock was reduced to a mere remnant by the latter part of the winter; that the property levied on was rising in value from February, 1853, when it was levied on, to October of that year, when it was sold. These facts were substantially testified to by all the witnesses.

We are compelled to admit that it is competent for the Sheriff, in a case like this, to prove, in mitigation of damages, any facts showing that the plaintiffs have suffered nothing or but little by his default or breach of duty. (*7 M. & W.* 463, 473. *4 Id.* 145. *10 Mass. R.* 470. *1 N. H.* 82. *2 Mass.* 526. *2 Bay,* 395. *2 Bing.* 317. *1 Johns. R.* 215. *7 Id.* 189. *11 Mass. R.* 89. *Id.* 188. *2 Greenl.* 46. *45 En. Com. Law R.* 577. *28 Id.* 388. *1 M. & W.* 713. *2 Cr. & M.* 413. *10 A. & E.* 719. *2 Eng. Law & Eq.* 260. *73 En. C. L. R.* 371. *24 Maine,* 188. *5 N. H.* 433. *2 Mass. R.* 374. *10 Id.* 479. *6 Pick. R.* 468. *9 Metcalf,* 564. *9 Conn. R.* 380. *16 Id.* 555. *1 Hill's N. Y. R.* 8. *4 Sandf. N. Y. R.* 67. *8 Watts,* 153. *5 Watts & Serg.* 455. *2 Gill.* 62. *9 Leigh.* 397. *1 Hawks,* 425. *1 Iredell,* 318. *Harper's Law R.* 72. *1 Bailey,* 646. *4 Littell,* 152. *4 J. J. Marshall,* 202. *3 McLean's C. C. R.* 97. *4 McCord,* 84. *16 Ohio,* 539. *6 Ga. R.* 244. *Sedg. on the Measure of Damages,* 506.)

Indeed, I am satisfied that the rule, that the whole sum must be given, is never applied to an action of debt upon the Sheriff's bond; and that it is only in debt for an escape on execution, under the English Statutes, that the measure of

Taylor *et al. vs. Johnson*, Gov. for use, &c.

damages is the amount of the judgment, without abatement on account of the poverty of the debtor or any other circumstance. And yet, so firmly persuaded I am of the necessity of holding all officers to a rigid accountability, from the Chief Magistrate of the Union down to a tide-waiter or a railway, tract-walker; and seeing, as I think I do, in many of the adjudicated cases, the cause as well as the proof of the degeneracy and disregard of the law in these latter days, I would, were it in my power, uphold and maintain the doctrine in *7th Georgia Reports* in all its stringency—not because it emanated from this Court, but because it is calculated to subserve and promote the best interests of the country. But convinced, as I am, that to do so would be to assume legislative functions, I cannot hesitate as to my duty.

[9.] [10.] The object of our law in requiring the Sheriff to give a bond and prescribing its conditions, was to provide, in addition to other remedies, more ample security to all persons interested in its faithful performance. It was not intended to increase the Sheriff's obligations or to render a more summary redress for his defalcations than existed by action on the case at Common Law; and consequently, not to conclude him from any defence which he had in that action. In a suit before a bond was required, actual damages only could be recovered, unless the action under the Statutes of Westminster 13, *Ed. I. ch. 11*, and 1 *R. II. ch. 12* was adopted. Why should the amount to be recovered be different after the bond? A suit on the Sheriff's bond is no more a pursuit of the remedy presented by the Statutes than was the action on the case. And this is the clear, legal and conclusive view of this subject which has controlled my judgment.

[11.] This, we repeat, is an action of debt, not under the Statutes of Westminster and Richard, but on a bond—a Statutory bond—with a collateral condition by the Sheriff and his securities, for the faithful discharge of his duties, and with a penalty annexed for a violation. At Common Law the whole penalty was recovered, notwithstanding it far exceeded the injury sustained.

Kinsey *et al.* vs. The Lessee of Sensbough *et al.*

[12.] To remedy this hardship and to render a resort to Equity for relief unnecessary, the Statute of 8 and 9 *Willm.*, III. ch. 11 was enacted. And that Statute has been adopted in Georgia. (*Schley's Digest*, 288.)

[13.] Under its provisions the defendant is liable to no greater damages than the plaintiff has sustained, to be ascertained by the verdict of a Jury, except in a certain class of cases, and this is not one of them. On the contrary, this case falls under the general rule, where the measure of damages is not fixed and certain, and where the party can only recover the damages which the Jury shall believe he has actually sustained under all the circumstances, and after a full investigation of all the facts.

No. 89.—WILEY KINSEY and others, plaintiffs in error, *vs.*
THE LESSEE OF JOSEPH SENSBOUGH AND OTHERS, defendants in error.

[1.] Where, in an action of ejectment, a demise is laid in the name of several lessors, and upon the trial, title is proven in one of them only, and the defendant shows by the Counsel who appears for the plaintiff, that he represents another lessor, between whom and the lessor in whom title is proven no connection is made out, the Counsel at the same time stating that he does not know the latter, and has no instructions from him: *Held*, that this was not a sufficient ground for the dismissal of the action.

[2.] Where, in an action of ejectment, an appeal was entered from a verdict in favor of the defendant, by one of several lessors of the plaintiff, and a motion was made by defendant's Counsel, after the case had proceeded to trial, and in his concluding remarks to dismiss the appeal: *Held*, that even if this motion might have been sustained at an earlier stage of the case, it was then made too late.

Ejectment, in Whitfield Superior Court. Tried before Judge JOHN H. LUMPKIN, October Term, 1854.

Kinsey et al. vs. The Lessee of Sensbough et al.

The lessee of Harrison Rogers brought an action of ejectment to recover from the plaintiffs in error a tract of land; subsequently, by an amendment, demises were laid in the name of Joseph Sensbough and other persons. On the appeal trial, the plaintiffs below introduced a grant to Joseph Sensbough, proved the *locus in quo* and closed. Defendants then proved by D. A. Walker, Esq. the Counsel for plaintiffs, that he never saw or knew Joseph Sensbough, nor knew where he lived, nor had any authority from him to use his name, but that he was employed by Harrison Rogers.

The Court charged the Jury, that Rogers had the right to use the name of Sensbough, without authority from him, and without showing any connection between his title and that of Sensbough, or that it was necessary for the assertion of his rights.

This charge is assigned as error.

Defendants' Counsel moved to dismiss the appeal, on the ground that there was no evidence of an appeal. The cause was originally brought in Murray County and transferred to Whitfield, when organized as a new county, by an order passed at Murray, transmitting it and ordering it entered on the appeal docket. The Court over-ruled the motion, on the ground, it would presume there was an appeal until the contrary was shown.

This decision is assigned as error.

UNDERWOOD, for plaintiff in error.

AKIN, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] We do not entirely agree with the decision of the Court, upon the motion to dismiss the case, because Harrison Rogers had shown no connection between his title and that of Joseph

Kinsey et al. vs. The Lessee of Sensbough et al.

Sensbough; yet, we think the Court was right in refusing the motion.

That motion rested upon the affidavit of Dawson A. Walker, Attorney at Law for Rogers, one of the plaintiff's lessors, (and he who seems to have been chiefly interested,) and on nothing else. As the case stood, that showing did not authorize a dismissal of the suit.

The Counsel making this motion seems to have lost sight of the peculiar character of this action. He should remember that the fictitious John Doe is here the plaintiff, and that according to the record as it was presented, Joseph Sensbough had precisely the same relation to the case which Harrison Rogers had. Both were lessors of the plaintiff. Joseph Sensbough was therefore as much entitled to the benefit of the verdict as was Harrison Rogers. The evidence introduced showed title in the former, and failed to connect the latter with that title. And there is nothing in the evidence of Mr. Walker which goes to negative the conclusion, that the recovery by the fictitious plaintiff should enure to the benefit of Joseph Sensbough. Although that Attorney may not know him, and may not represent him, yet Harrison Rogers may know him, and be authorized by him to have this suit brought. So that for all that appears in the affidavit, this is a good recovery.

As to the difficulty which may arise, when the Sheriff shall come to execute the writ of *habere facias*, in putting any other person than Joseph Sensbough in possession; that point is not at present presented for our decision, and it is not necessary that we should express any opinion upon it.

[2.] We affirm the judgment of the Court, also, in refusing to dismiss the appeal.

Taking into consideration the peculiar character of this action, we are not sure but that the appeal of Harrison Rogers, one of the plaintiff's lessors, may be said correctly to have carried the cause to the appeal for all of them.

But waiving this, we think that the motion to dismiss, presented as it was in the concluding speech of defendant's Counsel, was made too late. If it had been made at an earlier pe-

Matthewes et al. vs. Stanford et al.

riod, and the Court had held the appeal to have been irregularly entered, it might have been perfected, and thus delay and expense would have been saved. It would not, therefore, have been just to sustain the motion at that late stage of the cause.

No. 90.—JOHN R. MATTHEWES and others, plaintiffs in error,
vs. JOHN R. STANFORD and others, defendants in error.

[1.] A company owning land, throws it into the form of stock and allots shares of the stock to each member. It then levies an assessment from the members, on each share, and repays the assessment by an issue and sale of additional shares of stock. Afterwards, it becomes incorporated, and soon gets to be insolvent: *Hold*, that the creditors of the corporation have no right to require the stockholders of the corporation to pay them the amount of the assessment.

[2.] Misrepresentations made by a company before it has become a corporation, cannot, after the company has become a corporation, be made the ground of an action by creditors of the corporation, against the stockholders in the corporation.

[3.] Neither can fraudulent non-disclosures or concealments on the part of such company.

In Equity, in Habersham Superior Court. Decision on demurrer by Judge JACKSON, April Term, 1854.

This bill was filed by John R. Stanford and others, as creditors of the Habersham Iron Works Company, against John R. Matthews and others, the stockholders in the same, alleging that these persons associated themselves together and purchased a large body of land, with an iron foundry, forge saw, and grist mills, at the price of \$20,000, and divided out the same among themselves in shares of \$100 each; that at a meeting of these associates an assessment of ten percent. was laid upon

Matthews et al. vs. Stanford et al.

each share, which was promptly paid in. In December thereafter, they applied to and obtained from the Legislature an Act incorporating them as a body corporate. In the said charter appears this preamble, viz: "whereas, a company has been formed for the purpose of establishing manufactories of various kinds in the County of Habersham in this State, and especially for the smelting and working of iron, making castings, nails and bar-iron, and have, for these purposes, purchased an extensive body of land and water power in that county, and have now a large foundry and other machinery in actual operation, and have asked to be incorporated with such privileges as may enable them to increase their means and to extend their operations, not only in the various manufactures of iron, but to those of cotton, wool, hemp, flax and other articles essentially useful and necessary;" that they accepted the charter and continued to act under it until 1839; that in 1841, the company became insolvent and ceased to carry on operations; that relying upon the representations included in the said charter, the complainants gave credit to the company; and thus, their debts were contracted; that they have obtained judgments on their debts and they have been found insolvent. The bill farther alleged, that at the time of their application for a charter, the company was largely indebted for expenses and labor on account of the said property; that the foundry was not in actual operation, and that it required \$2,000 to put it into operation, which was subsequently done by means of the credit of the company; that in 1838, on the day of the acceptance of the charter, the said associates passed an order offering for sale twenty additional shares for the purpose of paying back the assessment of ten per cent. before referred to, which was accordingly done. All of which said acts were alleged to be frauds upon the said creditors; and that they were ignorant of the facts until April, 1849. The prayer was, that the stockholders might be compelled to make up the amount of their capital stock and for general relief.

The Court over-ruled a general demurrer to this bill, and this decision is assigned as error.

Matthews et al. vs. Staniford et al.

UNDERWOOD; T. R. R. COBB, for plaintiffs.

COBB & HULL, for defendants.

By the Court.—BENNING, J., delivering the opinion.

Is there any equity in this bill? If there is, it must consist in one or more of three things, of which the first is the repayment of the ten per cent. assessment.

It appears that before the company was incorporated, it converted its land into a stock, valued at \$20,000, and divided this stock into two hundred shares of \$100 each, and that it issued, and collected an assessment of ten dollars a share, on each stockholder, which it expended on its property; and that it repaid this assessment to the stockholders, by an issue and sale of twenty additional shares of stock.

All this, it appears, was done before the company accepted the charter; that is, before it became a corporation.

This being so, the \$2,000 for which the additional twenty shares sold, never got to belong to the corporation—never became a part of the capital of the corporation. That sum belonged to the company as the company stood unincorporated. And when it was applied to the payment of the assessment, it was well applied; for it was applied to the payment of a debt or debts which the company justly owed—the assessment constituting a debt or debts against the company in favor of the stockholders assessed.

And the creation of twenty additional shares of stock did not at all affect the quantity or value of the capital of the company. It merely diminished the value of each share in the capital. But this was a matter for stockholders, not for creditors.

[1.] By this operation then, nothing was abstracted from the capital of the corporation; and therefore, nothing was done, by the operation of which the creditors of the corporation could

Matthews et al. vs. Stanford et al.

complain, for all the right they could have against the corporation, was the right to have the whole capital or property of the corporation applied to the payment of their debts. And that right they had, notwithstanding this operation of the unincorporated company.

There is, then, no equity in this one of the three things.

The second of the three things is the misrepresentation, that the foundry and other machinery were in actual operation, made to the Legislature in the application for the charter.

But this misrepresentation, if made, was not made by the stockholders in the corporation—those parties who are the defendants to this bill; but by the unincorporated company. If, therefore, the misrepresentation raises a liability in favor of the creditors against any persons, it is against that company as is stated unincorporated. But it is not that company that is sought to be made liable by this bill. It is the stockholders in the corporation that the bill pursues. (1. Kelly, 525.)

The last of the three things is the indebtedness of the company at the time of their application for a charter, and the failure to disclose that indebtedness to the Legislature.

There is no allegation in the bill, that this indebtedness of the unincorporated company was paid off by the corporation—no allegation that the corporation diverted any of the corporate property to the payment of this indebtedness, which was not its own. On the contrary, the allegations in the bill seem to make the impression, either that this indebtedness had never been paid off by any one, or if by any one, by the company before it was incorporated, and after its application for incorporation.

This being so, how have these creditors been injured by this indebtedness? If it still exists, it exists against the individuals composing the company, as it stood unincorporated; and so, can never come in competition with the debts of these creditors, which are debts against the corporation. If the indebtedness no longer exists, having been paid off by the company before it was incorporated; then that with which it was paid off must have belonged to the corporation; and so, was never what this cred-

Walker, guardian, &c. vs. Wells.

itors of the corporation had a right to look to for their payment.

[3.] Again: If the non-disclosure to the Legislature of this indebtedness constituted a fraud on these creditors, by whom was it that the fraud was committed? By those failing to make the disclosure. And they were the members of the company as it stood unincorporated—not the stockholders of the corporation—stockholders, some of whom were different persons from those constituting the unincorporated company.

If, then, this non-disclosure was a fraud, the bill should have been against the parties to the fraud, instead of being as it is, against those who, in the character in which they are sued, viz: that of stockholders, were no parties to the fraud.

In this respect, this ground is like the one just considered. There being no equity, then, in any of these three things, none is in the bill; and therefore, the demurrer should not have been over-ruled, as it was by the Court below; but should have been sustained.

For the defendants in error was cited the *New Theatre* case in the first of *Stobhart's Reports*.

There are other reasons which, as it appears to me, show a total want of equity in this bill. But these I need not state.

No. 91.—DAWSON A. WALKER, guardian, &c. plaintiff in error,
vs. ANDREW J. WELLS, defendant in error.

[1.] In England a grant is issued by the Lord Chancellor, and a record is made of it in the Court of Chancery.

[2.] When it is proposed to vacate a grant in England, a writ of *scire facias* issues from the Common Law side of the Court of Chancery, and where the grant is enrolled, and is there adjudicated, unless the pleadings terminate in an issue of fact. When an issue of fact is formed, the pleadings

Walker, guardian, &c. vs. Wells.

are made up in the Rolls office and the record is sent into the King's Bench, to be tried by a Jury, where, on a verdict had, the judgment is rendered.

[3.] In Georgia, grants are enrolled in the Secretary of State's office, which is an establishment not only distinct from any of the Courts of the State, but belonging to another and independent department of the Government.

[4.] A *scire facias* is always founded upon a record, and issues from and is made returnable to the Court where the record is kept; and when employed to revoke a grant, it must be for some matter within the body of the grant.

[5.] Without legislation, the Courts of this State cannot acquire jurisdiction by process of *scire facias* over disputed questions relative to grants.

[6.] A proceeding by bill to cancel a grant, is a doubtful question even in England, where the Lord Chancellor is the sole judge of the Common Law branch of the Court of Chancery, in which all grants are made; and the making of grants by the Chancellor by affixing the Great Seal to them, is deemed an act of the Court of Chancery, by which the Court makes a record of the King's grants.

[7.] How can this jurisdiction be exercised in the State, where grants are created by another branch of the Government, which makes and keeps a record of them?

[8.] The Act of 1827 (*Cobb's Digest* 657) extends only to the correction of errors which have occurred in the Executive Department in the issuing of grants, and not to a mistake alleged to have been made by the person originally registering the name of the persons entitled to draw.

[9.] The Act of 1827 (*Cobb's Digest* 658) makes provision only for the counties of Lee, Muscogee, Coweta, Troup and Carroll; and the Act of 1828 (*Cobb's Digest* 657) contains a provision for the correction of bad spelling and transcribing the names of land lottery drawers in Dooly, Houston, Monroe, Henry and Fayette.

[10.] No Act passed for Cherokee or the ten counties into which it was subdivided.

In Equity, in Gordon Superior Court. Decision on ~~damages~~, by Judge JOHN H. LUMPKIN, September Term, 1854.

The bill in this case was filed by Dawson A. Walker, as guardian of certain orphan children, who were the heirs at law of William H. Stephens, who died a minor. It alleged that William H. Stephens "gave in for a draw" in the lottery of 1830 and 1831, as Berry Stephens' orphan, being the only child of Berry Stephens, that the person receiving the draw

Walker, guardian, &c. vs. Wells.

By mistake, omitted the apostrophe so as to enter the name, "Berry Stephens, orphan"; that said orphan drew lot No. 228 of 13th district 3d section of Gordon County, and a grant issued to Berry Stephens, orphan; that Wells had the grant in his possession and was in possession of the land; that the lot was sold at Sheriff's sale, as the property of one Absalom Holcombe, and purchased by Wells. The bill prayed for the correction of the grant.

On demurrer this Court dismissed the bill, on the ground that the Court had no jurisdiction to grant the relief prayed.

This decision is assigned as error.

WALKER; McDONALD, for plaintiff in error.

WOFFORD; ALEX, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The bill alleges, that Berry Stephens died, leaving a widow and one child, William Henry Stephens, who removed from Jefferson to Dooly County; that while living in the 633d Militia District of Dooly County, William Henry Stephens, the minor, gave in for a draw in the Cherokee Land Lottery, as Berry Stephens' orphan; that he drew lot of land No. 228, in the 18th district of the 3d section of originally Cherokee, now Gordon County.

That in 1838, the widow of Berry Stephens intermarried with one Amos Lane, by whom she had three children, who are the complainants in the bill; that on the 5th of May, 1839, William Henry Stephens died, leaving the complainants as his only heirs at law; that the person receiving the draw of the said William Henry Stephens, by mistake or otherwise, omitted to insert the apostrophe at the end of the s in his name, so that the name, as taken down on the list, was Berry Stephens, orphan, instead of Berry Stephens' orphan.

The bill charges that some one, unknown to the complainants, presented a grant to be issued to Berry Stephens' orphan;

Walker, guardian, &c. vs. Wells.

that the land was sold at Sheriff's sale as the property of one Absalom Holcombe, and purchased by Andrew J. Wells, who, in 1846, went into possession of the same and has remained in the occupancy thereof ever since.

The prayer of the bill is for the correction of the mistake in the grant, and for general relief.

The bill was, upon motion, dismissed at the hearing, for want of jurisdiction in the Court—and this ruling is assigned as error.

Is there Equity in the bill, conceding the Court had jurisdiction?

Suppose it be true, that no such person as Berry Stephens' orphan ever lived in Dooly County or any where else; and further admit what the bill does not charge, that Holcombe bought of some one personating the grantee, but without notice of the fraud, would not his title be good?

To maintain this bill, it was not only necessary to allege that Holcombe derived title through some fraudulent vendor claiming to be the grantee, but that he had notice of the imposture.

There is another question, however, which lies at the foundation of this controversy. Can the Court go behind the grant and examine the equity asserted in the bill? This is a new point, never adjudicated by this Court. We have repeatedly held, that a mistake of this sort could not be shown by parol proof; and intimated that *perhaps* it might be done by a direct proceeding instituted for the purpose. But are there not inherent and insuperable difficulties in the way?

[1.] [2.] In England, grants are issued by the Lord Chancellor, after affixing the Great Seal of the United Kingdom to them; and a record is made of them in the Court of Chancery. Consequently, when it is proposed, there, to vacate a grant, the writ of *scire facias* issues from the Common Law side of the Court of Chancery, where the grant is enrolled, and is there adjudicated unless the pleadings terminate in an issue or issues of fact. If they do, the pleadings are made up in the Rolls

Walker, guardian, &c. vs. Wells.

office and the record sent into the King's Bench, to be tried by a Jury, where, on a verdict had, the judgment is rendered.

[3.] But in Georgia, grants are enrolled in the office of the Secretary of State, which is an establishment not only distinct from any of the Courts of this State, but belonging to another and independent branch of the government.

[4.] Now a *scire facias* is always founded upon a record, and issues from and is made returnable to the Court where the record is kept.

[5.] Without legislation, then, how can the Courts acquire jurisdiction by process of *scire facias* over disputed questions relative to grants? That is not all; a *scire facias* only reaches such matter as appears upon the face or within the body of the grant. It would afford, therefore, no adequate remedy for cases like the present.

In some of the States, provision has been made to obviate the difficulty, at least in part. In North Carolina an Act was passed (1798) directing a copy of the grant from the Secretary of State's office to be filed in the office of the Clerk of the Superior Court, upon which a *scire facias* might issue, calling up on the defendant to shew cause why the grant, improperly issued, should not be annulled. (*Taylor's Rev. Appendix.*)

[6.] As to proceeding by bill to cancel a grant, but few instances can be found in the British books; and some of these are of doubtful authority.

In *Attorney General vs. Vernon et al.* (1 *Vernon's Rep.* 277) (1684) the defendant's Counsel insisted that no precedent existed to repeal Letters Patent by an English bill in Chancery. That it was *caveat primum impressionis*. But the Lord Keeper said, "The question was short—whether there be fraud or not. If a fraud, it was properly relievable in that Court. It was not so (he said) that such matter should be stifled upon plea." He, therefore, reserved the benefit of it till the hearing, however "he would not give any countenance to such a case."

The same case came up again, (*Vide Post*, p. 370) and like the other sides discussion was argued at great length and with much ability. Counsel for the defendants re-affirmed, that no preced-

Walker, guardian, &c. vs. Wells.

dent could be found of a grant being destroyed by English bill; and they insisted upon the application of Littleton's rule, that *what never was never ought to be*. But the Court overruled the objection, and held that an English bill was the proper remedy in this case.

Lord Chief Baron Montagu said, that though there was no precedent of any such suit, yet all precedents had a beginning; and that it was the province and privilege of a Court of Chancery to create precedents; that the Court must find out new ways to obviate the mischiefs of the age, for *crescit in ore dulcis*.

Lord Chief Justice Jones said, the pleadings in the case being very long, and the proofs voluminous, he would not (having but an old, decayed memory and wanting the use of hands which might in some measure supply that defect) repeat all the circumstances of the case: but in a few words would deliver his opinion. He was sorry that Col. Vernon, an honest gentleman and of known loyalty, should be the occasion of making a precedent of this nature; but there was a time when all precedents began; and as much huddle and haste had been used in passing this grant, he thought his Lordship might very well decree the patent to be delivered up and cancelled.

Lord Chancellor Jeffries said he was clear, that had this patent passed ever so regularly, yet the Court of Chancery might have decreed it to be delivered up. He said he could wish the Crown had not parted with so many flowers, as he was persuaded there would not have been so many rebellions. And although Col. Vernon was an honest gentleman of good quality; still, the honor of Tuthery was of that next extant, and so many noblemen had it that it was not fitting for a person of Col. Vernon's degree.

Chancery, in England, not only decrees the revocation of patents, but to amortize letters of reprisal, and to seal the Dutch Ambassador upon the back of it, by the Chancellor's saying, that "he never came into the King's presence but that he was making fresh complaints. See *The King vs. George, (1. Vernon, 54.)*

Walker, guardian, &c. vs. Wells.

[7.] If this power be doubtful even in England, where the Lord Chancellor is the sole Judge of the Common Law branch of the Court of Chancery, in which all grants are made; and the making of grants by the Chancellor is considered an act of the Court of Chancery, by which the Court makes a record of the King's grants, how can this jurisdiction be exercised in this State, where the Courts have no connection with nor power over the record of grants?

One member of this Court, at least, holds that inasmuch as the Governor of Georgia has authority to issue grants, that he alone must be the judge of the sufficiency and regularity of the various preliminary steps required to be taken toward the completion of a legal title, and to see that these prerequisites have all been complied with. And that the acts of the Executive, in this respect, are as conclusive as the Statutes of the Legislature or judgments pronounced by Courts of Justice.

Without admitting this proposition to the extent stated, which I do not, but on the contrary, entertaining no doubt but that there are cases where the validity of the grant is necessarily examinable, both *at Law* and in *Equity*; and moreover, holding, as I do, that cases may arise where equitable rights, originating before the date of the grant, may be inquired into; still, I have taxed my ingenuity in vain to discover what relief to grant in the present case.

The cancellation of the grant would vest the title in the State and not in the complainant. A conveyance from Wells, the tenant in possession, might or might not afford redress, because it does not appear, from the bill, that Wells' title is deducible from Berry Stephens' orphan, the grantee. Even if it did, before rendering such a decree, or indeed any other, should not the State, by its proper officer or agent, be made a party? And is not special legislation needed for just such a case?

[8.] The Act of 1837, (*Cobb's Dig.* 657,) does not embrace this case. It extends only to the correction of errors which have occurred in some of the offices in the Executive Department in the issuing of grants; whereas, this mistake is alleged

Allan vs. Comstock & Bro.

to have been made by the person originally registering the names of the drawers in the 63rd district of DeKalb County. [9.] The Act of 1827, (*Cobb's Digest*, 656,) makes provision for just such cases as this, in the counties of Lee, Muscogee, Coweta, Troup and Carroll, and the Act of 1828, (*Cobb's Digest*, 657,) contains a similar provision for the bad spelling and transcribing the names of persons entitled to draw in DeKalb, Houston, Monroe, Henry and Fayette.

[10.] But as yet, no Act has been passed for Cherokee, where this land was located, or for any one of the ten counties into which it was sub-divided.

Upon the whole, we think the Court was right in refusing to exercise jurisdiction in the case made.

No. 92.—T. ALLAN, plaintiff in error, vs. COMSTOCK & BROTHER, defendants.

[1.] A makes the following order on C & B:

"LAWRENCEVILLE, GA. Feb. 25, '52.

Messrs. Comstock & Brother—Please send me a small assortment of your most saleable medicines, to the amount of fifty dollars, at one half the retail prices, at 12 months credit, with privilege of exchange.

T. ALLAN."

A being sued for the price of the goods, offers to prove a verbal agreement, made at the time when the order was drawn, that the goods were to be delivered to him at Lawrenceville at the risk of C & B: Held, that A should have been allowed to prove the verbal agreement.

Action on account, in Gwinnett Superior Court. Tried before Judge JACKSON, September Term, 1854.

This was an action for goods sold and delivered, to the

Allan vs. Comstock & Bro.

amount of \$66⁸⁸, brought by Comstock & Brother, merchants of New York, against T. Allan, a merchant of Lawrenceville, Ga.

The bill of particulars attached to the declaration, showed the goods to have been nearly all patent medicines of various kinds, with a small quantity of other drugs. The plea of defendant denied receiving the goods.

Plaintiffs, on the trial, introduced the following order:

"LAWRENCEVILLE, GA. Feb. 25, '52.

Messrs. Comstock & Brother—Please send me a small assortment of your most saleable medicines, to the amount of fifty dollars, at one half the retail prices, at 12 months credit, with privilege of exchange.

T. ALLAN."

The plaintiff's testimony showed that the goods had been boxed up and shipped by a vessel to Charleston, marked for the defendant at Lawrenceville, Ga. He proved, also, that some other articles had been ordered, verbally, through their agent, one B. L. Judson, (to whom the above order was given,) at the same time, making up the amount of \$66⁸⁸.

The defendant introduced Henry Allan, his clerk, who testified, among other things, that at the time the above order was given, the defendant declined, for a time, to take any of the medicines, but finally agreed to do so on sundry inducements being proffered by said Judson, as the agent of plaintiffs; among which was an agreement, that the medicines should be delivered at Lawrenceville at plaintiff's risk; and that thereupon, the defendant signed the order, of which Judson had a number prepared in blank; and that the goods were never received by the defendant at Lawrenceville.

The Court charged the Jury, that the testimony of Henry Allan, as to the contract to deliver the goods in Lawrenceville, at plaintiff's risk, went to vary and add to the written contract, and could not be considered.

On which decision error is assigned.

550. SUPREME COURT OF GEORGIA.

Allan vs. Comstock & Bro.

Cobb & Hull, Underwood, for plaintiff in error.

Alexander, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The order for the medicines was in these words:

"LAWRENCEVILLE, GA. Feb. 25, '55.

Measures: Comstock & Brother—Please send me a small assortment of your most saleable medicines, to the amount of fifty dollars, at one half the retail prices, at 12 months credit, with privilege of exchange.

T. ALLAN."

Would parol evidence that it was agreed, at the time when this order was drawn, that the medicines were to be delivered by Comstock & Brother to Allan in Lawrenceville, have varied or contradicted this order? The Court below held that it would.

It appeared that Comstock & Brother were merchants or traders of New York.

It seems to this Court to be entirely consistent with the meaning of this order, that the medicines should be sent by the vendors to Lawrenceville, and there be delivered by them to the vendee. The order is simply silent as to the manner of delivery. It gives the vendors no authority to deliver the medicines to a ship in New York harbor or to any common carrier. How, then, can they be allowed to say, when they have delivered the goods to a ship to be carried to the vendee, that they have delivered them to the vendee himself? By reason of a usage they insist. But that usage, if it exists at all, is a usage which itself exists in parol. It is the vendors, then, that are the first to seek to vary the writing by the introduction of parol evidence.

They, in effect, say that on such orders, it was their usage

Allan *vs.* Comstock & Bro.

to deliver goods in New York to a ship, &c. as to the vendee himself; and they then insist that the vendee, in this case, is to be presumed to have contracted in reference to the usage; that is to say, is to be presumed to have agreed, outside of the writing, by parol, that the goods might be delivered for him to a ship.

Suppose it be admitted that they may say this. Then it follows, that if they may show, by parol, the parol usage, and may raise a presumption from the existence of that usage, that the vendee agreed to be bound by it, the vendor may, on his part, by parol, rebut the presumption and show that he did not agree to be bound by the usage.

And this is all that the vendee offered to do in this case.

Indeed, the testimony of the vendors hardly makes out a usage. It fails to show that the vendee, Allan, knew anything about the usage; and therefore, fails to show, does it not, that he could have contracted in reference to it.

Leaving usage out of the question, the vendors would not, by the order, have been authorized to deliver these goods to a ship or other common carrier. And had they done so, the carriage of the goods would have been at their risk. (*Anderson vs. Hodgson*, 5 Price, 630. *Vale vs. Bayle*, Coup. 294. *Davies vs. Peck*, 8 D. & E. 330. *Dutton vs. Solomonson*, 3 Bas. & Pul. 584.)

And to my mind, the greatest doubt in this case is, whether the vendor's had the right to vary the order by the sort of showing which they made of a usage. But if they had, the vendee, certainly, on his side, had the right, by the same sort of evidence, to rebut the presumption that he had agreed to be bound by the usage, and so to preserve the writing from being varied by a parol usage.

The evidence, we think, was admissible.

So there ought to be a new trial.

Printup vs. Mitchell.

No. 98.—JOSEPH J. PRINTUP, plaintiff in error, vs. DANIEL R. MITCHELL, defendant.

- [1.] Notwithstanding the answer to a bill filed for specific performance denies the agreement; still, it may be established by *alibi* proof.
- [2.] Where the direct and cross questions are precisely the same, the latter may be answered by reference to the answers already made to the direct interrogatories.
- [3.] A witness may testify as to his *understanding* of what was said or done by the parties.
- [4.] When an instrument is apparently altered, it will be presumed to have been done at the time of its execution, if nothing is shown to the contrary. But the whole matter, both as to the fact of the alteration as well as the *animus* with which it was done, is left to the Jury.
- [5.] The Court, upon the usual proof of the execution of the instrument, will admit it in evidence, without reference to the character of any alteration upon it, about which the Court will presume nothing.
- [6.] When a witness, himself, is competent to testify, a receipt given by him is inadmissible.
- [7.] When a person is doing any act material to be understood, his declarations made at the time, are admitted in evidence as a part of the *res gestae*, if made in good faith, of which the Jury are the judges.
- [8.] To make these declarations evidence, they must be concomitant with the principal act, and connected with it.
- [9.] There are cases, though rare, where acts done by the defendant can be made a ground for compelling him to perform the agreement; particularly, if he be put in possession of the premises.
- [10.] Specific performance will never be decreed in favor of a vendor who has had no prejudice.
- [11.] Courts of Equity do not profess to execute parol agreements, merely because they are satisfactorily proved; there must be prejudice to the plaintiff.
- [12.] Where an injunction to stay Common Law proceedings has been improperly granted, it cannot be made the pretext for retaining a bill for relief, which, of itself, has no equity.
- [13.] To maintain a bill for the purpose of accounting, it must appear that there is some complexity in the accounts, or some other special cause which will prevent an adjustment at Law.
- [14.] Verbal declarations, to be available as evidence, should not only be clearly proved, but also, it should appear that they were deliberately made and precisely identified.

Printup vs. Mitchell.

[15.] Verbal admissions, hastily and inadvertently made, should have little or no binding efficacy.

[16.] A parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly and satisfactorily, as to leave no reasonable doubt as to the agreement.

In Equity, from Floyd Superior Court. Tried before Judge TRIPPE, December Term, 1854.

The facts of this case are as follows:

Joseph J. Printup had brought his action at Law against Daniel R. Mitchell, claiming some Two Thousand Dollars for work and labor done and materials furnished, in enlarging the buildings on a certain lot of Mitchell's in the town of Rome, known as the Buena Vista House.

Mitchell filed this bill enjoining said action, setting up a parol agreement made between Printup and himself, by which Printup was to do the work in question, and for compensation, was to become a half owner of the property. The bill charged, also, that Mitchell had advanced to Printup, during the progress of the work, some \$1800; that he, Mitchell, had received for rent of the premises about \$800; that Printup had built on the land two offices, one of which was now occupied by Mr. Underwood who, complainant supposed, held under Printup; but the bill did not positively allege that Printup had ever had possession of the premises, except while he was carrying on the work. It seems that the premises had been for some time untenanted. The bill prayed for an account, and that Printup should take a deed to a moiety of the property, and that the same should be divided.

A motion was made to dismiss this bill for want of equity, at the commencement of the trial, and afterwards, when the testimony was closed; and the refusal of this motion is assigned as error.

The defendant, in his answer, denied the existence of any such contract as that set up in the bill.

The following points arose during the trial: Defendant objected to the testimony of T. V. Smith and others being admitted.

Printup vs. Mitchell.

ted to prove the parol agreement, it having been denied by the answer. Defendant also objected to the interrogatories of Young Mann and of A. N. and S. H. Verdery, offered by complainant, because the witnesses did not answer the cross-questions, the witnesses only referring to their answers to the direct questions.

The witness, Young Mann, was permitted by the Court, (the defendant objecting) to state "his understanding" of what he heard the parties say in relation to the agreement between them.

Certain receipts of M. A. Choice, W. C. Butler and James McAmis, introduced by plaintiff, were allowed to go to the Jury, the defendant objecting to them, on the ground that they appeared, on their face, to have been altered. The Court rejected the following receipt of others similar to it, offered by defendant:

"Received of J. J. Printup \$25, in part payment, as per contract with D. R. Mitchell for wood work on the Buena Vista House. (Signed) JAMES McAMIS."

(McAmis was a witness in the cause by interrogatories.)

The Court also rejected evidence offered by defendant, of his own sayings, while employed in the work, as to whom he was doing it for. And on all these rulings of the Court, defendant assigns error. A great deal of testimony was introduced on both sides, not particularly noticed.

The Court charged the Jury, among other things, that it was their duty to reconcile the testimony if possible; if not, then to find according to the preponderance of the testimony. That if they considered the contract proved, the complainant was entitled to relief. The Jury rendered a decree for complainant, in conformity to the prayer of his bill; and defendant excepts to the said rulings and charges of the Court.

J. W. H. UNDERWOOD, for plaintiff in error.

ALEXANDER; AKIN, for defendant in error.

Printed by Mitchell.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] If the defendant denies the existence of the parol contract sought to be performed, and insists upon the benefit of the Statute, can the case be made out by parol evidence? This is the first point presented in the bill of exceptions; and it we concede, a vexed question.

There is high authority for holding that the bar to a decree is complete under such circumstances; but we think the more modern practice and the better doctrine is, to allow the answer to be contradicted and overcome by *attende* evidence. To allow the answer to go uncontradicted is to furnish too strong a temptation to perjury by making in the interest of the defendant, in every case, to deny the agreement; since, if confessed, he would be bound to perform it. It seems to us that the rule once established, that the defendant is bound to confess or deny the agreement, and about which there is no longer any dispute, it must follow, as a necessary consequence, that where the agreement is denied, the answer is liable to be contradicted by parol prop. And this disposes of the objection made to the testimony of T. V. Smith and others.

[2.] Certain depositions were objected to, because the witnesses did not answer the cross-interrogatories, except by reference to their answers to the direct questions.

This practice has been generally followed in our Courts, and we see no objection to it upon principle. If the direct and cross-questions are precisely the same, why should the answer to the latter be repeated, in *totidem verbis*? Should the interrogatory be varied or contain some additional inquiry, the answer, of course, should be adapted to the new phase in which the question is propounded.

[3.] The testimony of Younge Mann was objected to, because he only testified as to his *understanding* of what passed between the parties relative to the agreement. This species of evidence was held to be admissible by this Court, in *Moody & Wife vs. Davis*, (10 Ga. R. 408.)

Printup v. Mitchell

[4.] Another exception is, that the receipts of Mrs. M. A. Choice, Mr. W. C. Butler and Mr. James McAmis were allowed to go to the Jury without explanation, the defendant objecting to them on the ground that they appeared upon their face, to have been altered.

In ancient times, when few could write and when the business which required writing, was done by those who were skillful, where an instrument was suspicious, by reason of any apparent alteration, the Court took it upon itself to decide, upon an inspection of the paper, that it was void. (*Coke Litt.* 35 n, 7.) But such a principle could not long be supported. And the rule may now be thus stated: an alteration of a written instrument, if nothing appear to the contrary, should be presumed to have been made at the time of its execution. But, generally, the whole inquiry, whether there has been an alteration, and, if so, whether in fraud of the defending party or otherwise, to be determined by the appearance of the instrument itself, or from that and other evidence in the case, is for the Jury.

[5.] The Court, upon the usual proof of the execution of the instrument, should admit it in evidence, without reference to the character of any alterations upon it, about which the Court will presume nothing, leaving the whole question to be passed upon by the Jury. (*Leyfield's case*, 10 *Rep.* 92. *Coke Litt.* 225, a. 4 *T. R.* 338. 2 *Dal.* 306. 1 *Peters.* 560. 2 *N. Hamp. Rep.* 543. 20 *Verm.* (5 *Washb.*) 205. 11 *Conn.* 531. 9 *S. & M.* 375. 5 *Barr.* 279.)

[6.] The defendant offered a receipt, given by James McAmis, to J. J. Printup, to the following effect: "Received of J. J. Printup \$25, in part payment, as per contract with D. R. Mitchell, for work done on the Buena Vista House," &c.

McAmis, himself, being a competent witness, his receipt was hearsay evidence; and therefore, properly ruled out by the Court.

[7.] The Court rejected the sayings of the defendant, while employed on the work, as to whom he was doing it for.

We are of the opinion, that the declarations made by Mr. Printup, while engaged in putting up the improvements, that

Printup *vs.* Mitchell.

he was doing the work for Mr. Mitchell, ought to have been admitted in his favor. They were connected with the principle fact under investigation. They were made at a time and under circumstances when it was not the interest of the declarant to disparage his title to a moiety of the lot. These declarations and conversations show the true opinion and state of mind of Mr. Printup at that particular period. They are parts of the *res gestæ*.

Where a person changes his residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or does any other act material to be understood, his declarations, made at the time of the transaction, and expressive of its character, motive or object, are regarded, say the authorities, as "verbal acts, indicating a present purpose and intention;" and are therefore admitted in proof like any other material facts. (See 1 *Greenlf. Ev. sixth edition*, §108, n. 1 and the cases there cited.)

It is now well settled, that the declarations of the possessor of land, that he is tenant to another, are admissible as evidence, because made against the interest of the party. But Mr. Greenleaf suggests, that no good reason can be assigned why every declaration, if made in good faith and under circumstances calculated to create no suspicion of its sincerity, should not be received as a part of the *res gestæ*, leaving its effects to be governed by other rules of evidence. And he refers to numerous precedents, English and American, in support of the proposition. (1 *Vol. 6th Ed.* §109, n. 4.)

It has been held, that a statement made by a person not suspected of theft, and before any search made, accounting for his possession of property, which he is afterwards charged with having stolen, is admissible in his favor. *Rex vs. Abraham*, (2 *Car. & K.* 550.) And letters written during absence from home, are admissible as evidence, explanatory of the motive of departure and absence, the departure and absence being considered as one continuing act. *Rawson vs. Haigh*, (2 *Bing.* 99, 104.)

Printup vs. Mitchell.

[8.] To make these declarations evidence, they must be ~~co-~~comitant with the principle act and so connected with it as to be regarded as the mere result and consequence of co-existing motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct. (1 *Greenl. Ev.* §110.)

[9.] A motion was made to dismiss the bill at the beginning of the trial, and repeated when the testimony was closed. And the refusal of the Court to grant the motion is assigned as error.

What are the facts?

Joseph J. Printup sues at Law to recover of D. R. Mitchell for work and labor done and performed and materials found in the improvement of his premises in Rome. Mitchell files his bill, in which it is alleged that this pretended indebtedness originated on a parol contract between Printup and himself, to the effect, that upon the completion of the improvements upon the Buena Vista lot by Printup, he should be entitled to a conveyance from Mitchell to a moiety of the property. It charges that the improvements have been finished, and prays that Printup may be decreed to take a deed, and that his action at Law be perpetually enjoined.

Can a bill for specific performance be maintained under such circumstances? The old practice, it is said by some writers in Courts of Equity, was in all cases, first to send the parties to Law, to ascertain whether there was any remedy there or not. And provided there was no remedy at Law, then Equity would interpose. To sustain this bill, this ancient rule would have to be reversed. And the interference of *Equity* would be invoked in all cases, in the first instance, notwithstanding the remedy at Law was full and complete.

[10.] [11.] It is exceedingly difficult, at all times, for the vendor to ask the interposition of a Court of Equity to enforce a parol contract. Chancery will sometimes grant relief, especially where possession has been given and retained by the vendee. In *Buckmaster vs. Hanep*, (7 Ves. 341) the Court say: "The vendor had no prejudice. He had done nothing

Printup vs. Mitchell.

to entitle him to say the non-execution was a fraud upon him. Had he let Barlow into possession, that would be an act by which he might have had a prejudice. I am aware there are cases that acts done by the defendant can be made a ground for compelling him to perform the agreement, but it is difficult to bring these cases to bear; for what do such acts amount to when there is no prejudice to the plaintiff? Only to proof of the existence of the agreement. But the Court does not profess to execute a parol agreement merely because it is satisfactorily proved."

In the case before us, it may be fairly inferred from the proof, that possession never was given by Mitchell to Printup, only as contractor, to enable him to make the improvements. There is not a scintilla of evidence that he ever held the lot one hour as purchaser. One thing is certain, the occupancy by him has long since been abandoned, and the premises are entirely under the control or at the disposal of Mr. Mitchell. What more does he want? The property has been paid for by Printup. Mitchell holds it, and his complaint is that Printup persistently refuses to take a title to half of it. And he prays Chancery to lay its hands upon him and compel him, *nolens volens*, to take a conveyance!

[12.] It is said, in the argument, that Equity having obtained jurisdiction for the purpose of the injunction, will retain it to administer the relief sought. But the obvious reply to this is, that the injunction to stay the proceeding at Law should never have been allowed, the defense at Law being complete. And this being so, it cannot be resorted to as a pretext for holding on to the bill for specific performance—two wrongs cannot make a right.

[13.] Again, it is contended that the bill should not be dismissed, as it will serve to adjust the unsettled accounts between the parties.

To make this ground tenable, it should further appear that the accounts cannot, owing to their complexity or some other special cause, be arranged in a Court of Law. Nothing of this sort is pretended.

Printup vs. Mitchell.

There is no foundation left to support this bill. . Indeed, it is rather an extraordinary proceeding. Not only does Mitchell remain in the undisturbed and undisputed ownership and occupancy of the property, a moiety of which, if the averments in the bill are true, has been bought and paid for by Printup : but he has in his hands some Eight Hundred Dollars coming to Printup, as his share of the net proceeds arising from the rents, issues and profits of the lot !

What is to be the practical result of this decision ? Mitchell sets up this special contract, as he is entitled to do, viz.: that the work and labor were done and the materials furnished by Printup, in consideration that he (Mitchell) would convey to Printup one half of the improved lot. If he can prove his defense, he defeats a recovery at Law. He holds a demand against Printup for upwards of Eighteen Hundred Dollars for money advanced to enable Printup to carry on the job. He not only prevents a finding for Printup, but he gets a judgment against him by way of a set-off for this counter-claim. He then has the Buena Vista House, the Eight Hundred Dollars coming to Printup as his share of the rent—has defeated his suit at Law and obtained a judgment against Printup for more than Eighteen Hundred Dollars !

Ought not this to satisfy Mr. Mitchell ? Can he reasonably desire more ?

All that I have said, proceeds upon the supposition, of course, that Mitchell will establish, by proof, the case made by his Bill. If he cannot, at Law, he would have failed in Equity. But whether he can or cannot, will make no difference as to his equity.

And now, the position of parties will be changed. Printup will file his bill for specific performance and for account. Mitchell will repudiate the agreement and insist that the complainant be held to strict proof thereof. He will refer to the answer of Printup to his bill, flatly denying that any such contract ever existed; and with a deference for his adversary never before manifested, will insist that the Jury shall believe him in preference to himself. Printup will exhibit the sworn

Printed at Mitchell.

bill of Mitchell, and with a self-distrust truly amiable, contend that the Jury shall give full faith and credit to his opponent. How the parties shall extricate themselves from this dilemma, we will not anticipate, but leave it to the ingenuity of their able Counsel to point out a way when the exigency shall arise Sufficient unto the day, &c.

[14.] Before concluding, we propose to notice, briefly, two points in the charge of the presiding Judge.

In commenting upon admissions, he remarked, that when clearly established, they were entitled to high consideration. Knowing, as we do, the danger of this species of evidence, we think it best not to relax any of those rules which are designed to guard it against abuse. It is not only necessary that the declarations should be clearly proved, but they should, say the books, be deliberately made and precisely identified. (*Riggs vs. Curgiven*, 2 Wils. 395, 399. *Glassford on Ev.* 326. *Commonwealth vs. Knapp*, 9 Pick. 507, 508, *per Putnam, J.*)

[15.] Indeed, verbal admissions, hastily and inadvertently made, however clearly established, should have little or no binding efficacy. (*Salem Bank vs. Gloucester Bank*, 17 Mass. R. 27. *Barber vs. Gingell*, 3 Esp. 60. *Smith vs. Burnham*, 3 Sumn. 435, 438, 439. *Cleveland vs. Burton*, 11 Vermont R. 138.)

It is unquestionably true, that while all experience teaches that verbal declarations should be received with great caution; subject as they are to much imperfection and abuse, still, they exert, usually, a most controlling effect upon the minds of the Jury.

[16.] Our learned brother instructed the Jury to weigh the evidence and render a verdict accordingly. A parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly and satisfactorily as to leave no reasonable doubt as to the agreement. It is a serious matter to substitute a parol sale of real estate for a deed.

The decree of the Circuit Court is reversed.

Baker, Wilcox & Co. vs. Herndon.

No. 94.—BAKER, WILCOX & CO. plaintiffs in error, vs. REUBEN HERNDON, defendant.

[1.] That construction of the 4th section of the Statute of Frauds, which requires, that in every agreement to answer for the debt, default or miscarriages of another, the consideration must appear in writing, having been adopted by the English Courts subsequent to the 14th of May, 1776; it is doubtful if the same has been ever settled or sanctioned as the law of our State. Such being the case, our Act of January 19th, 1852, declaring what shall be the proper construction of this section, is decisive thereof, and applies to an agreement made before the passage of the Act.

Attachment, in Floyd Superior Court. Tried before Judge TRIPPE, December Term, 1854.

The facts are fully set forth in the bill of exceptions, as follows:

Baker, Wilcox & Co. offered in evidence the following instruments in writing, of which the following are true copies, to-wit:

“ STATE OF GEORGIA, FLOYD COUNTY:

I, Reuben Herndon, do agree to pay, or cause to be paid, to Messrs. Scranton & Smith of Augusta, the sum of Three Hundred and Ninety Two Dollars, and Messrs. Baker, Wilcox & Co. of Augusta, the sum of Two Hundred and Five Dollars —said notes made and signed by Thomas H. Causler, which said sum of money I do pay or cause to be paid for the said Causler. January 28th, 1847.

REUBEN HERNDON.”

“ \$205 $\frac{1}{100}$. KINGSTON, GA. January, 18th, 1847.

One day after date I promise to pay Baker, Wilcox & Co. or order, Two Hundred and Five $\frac{1}{100}$ Dollars, for value received.

T. H. CAUSLER.”

Baker, Wilcox & Co. vs. Herndon.

- It was admitted that said note was the note referred to in said instrument of writing, and the testimony of John H. Underwood, which was admitted, as follows:

Said Herndon and said T. H. Causler were in co-partnership in selling groceries; that said Herndon agreed to pay said Causler the money said Causler had advanced, with interest, from time paid in, and said Herndon took all the effects belonging to them, and was to pay said debts given for goods, bought for them together; heard Herndon promise Thomas S. Baker, of said firm of Baker, Wilcox & Co. to pay said debt due said firm. Plaintiff then closed. Defendant offered no evidence, but requested the Court to charge the Jury, that said instruments in writing sued on, came within the 4th section of the Statute of Frauds and Perjuries, and that the plaintiffs, therefore, were not entitled to recover.

That the Act of the Legislature being an Act to give a construction to the fourth section of the Statute of Frauds, so far as the same relates to a party defendant being chargeable upon any special promise to answer for the debt, default or miscarriages of a third person, &c. approved January 19th, 1852, did not act retrospectively, and could not embrace this case; and that the writing aforesaid being dated before the passage of the Act, could not be enforced under said Act, although suit was brought on said instrument subsequently to the passage of the Act.

That there was no sufficient evidence offered to relieve said instrument of writing sued upon from the operation of the Statute of Frauds; that said instrument must show a consideration upon its face.

The Court then charged the Jury as follows:

"That the instrument sued upon came within the 4th section of the Statute of Frauds; and therefore, the plaintiff could not recover upon said instrument, it being to pay the debt of a third person; and that no consideration appeared upon the face of the instrument, to relieve it from said Statute of Frauds.

Baker, Wilcox & Co., vs. Herndon.

That the Act of January 19th, 1852, could not apply to this cause, it having no retro-active force, the instrument sued upon being dated previous to the passage of the Act, although the suit was brought subsequently to the passage of the Act.

That there was no sufficient evidence offered to relieve said instrument of writing sued upon from the operation of the Statute of Frauds; that said instrument must show a consideration upon its face."

To which charges of the Court thus given, Counsel for plaintiffs then and there excepted, and now in this Court excepts, and alleges the same to be error.

PRINTUP, for plaintiff in error.

UNDERWOOD, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] This agreement is within the 4th section of the Statute of Frauds, according to the construction which has been usually given to that Statute. If that construction controls this contract, this instrument is void. But should it govern it?

The language of the Statute is, that "No action shall be brought" &c. "whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, &c. unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c. Now the construction to which we are referring, has been based upon the signification of the word "agreement". It has been held that an agreement is a contract; that the consideration is an integral part of every contract, and should not lie in averment or parol.

This view of the subject is not without its difficulties. Why should the word agreement, in this connection, receive so very strict a construction?

In the view of the matter which this construction involves,

Baker, Wilcox & Co. vs. Herndon.

every contract of this sort should import and comprehend a perfect mutuality of obligation; otherwise, the whole agreement is not to be considered in writing. In such case, both parties (as is somewhere suggested) should sign the instrument; otherwise, the full consideration for the signing by the party charged, does not appear in the writing. This is carrying the doctrine to an extent greater than it was ever carried before the case of *Wain vs. Walters*, (5 East. 10); in which the word *agreement* received the construction of which we have been speaking, to an extent, indeed, which was not recognized when the laws of England were first adopted in our State.

The case of *Wain vs. Walters* was decided in the year 1804. The case of *Egerton vs. Matthews*, (6 East. 30,) followed soon afterwards. And on these two cases this doctrine chiefly rests for support. It may be well doubted, therefore, whether or not this construction has been ever settled and sanctioned by proper authority, as the law of Georgia.

Thus looking at the matter, we regard the Act of January 19th, 1852, as settling the question. That Act declares: "That from and after the passage of this Act, that part of the 4th section of the Statute of Frauds, so far as the same relates to a party defendant being chargeable upon any special promise to answer for the debt, default or miscarriages of a third person, &c. be so construed as to make any party defendant liable and chargeable upon any special promise to answer for the debt, default, or miscarriages of a third person: Provided, the same be reduced to writing, and that the express agreement, in writing, to answer for the debt, default, or miscarriages of a third person be sufficient to sustain an action on the same, although no consideration may be expressed in the written agreement to do the same." These terms may be considered as a legislative declaration, of the sense in which this section of the Statute of Frauds had been adopted and made the law of our State.

In this point of view it is not objectionable, as being retroactive in its effect.

Nor can this effect of the Act be considered as unconsti-

Baker, Wilcox & Co. vs. Herndon.

tional in any point of view. It cannot be said to be *ex post facto*; so in its character, for the reason that it is not a penal Statute, as well as for the reason which shows it not to be retrospective. It cannot properly be said to impair the obligation of a contract, because it makes that a contract which, by a different construction, would have been none. Nor does it deprive any one of a vested right, in the constitutional sense of the term.

If not in one of these ways unconstitutional, it cannot be denied but that the Legislature had the undoubted right to pass this Act, declaring the sense in which a Statute of the British Parliament had been adopted and made the law of Georgia.

We may observe, in passing, though it is not necessary to the view of this case, which we present, that retrospective Acts, the legality of which no one disputes, are being continually passed by the Legislature of our State; as we have had occasion to mention in the case of *Boston & Gunby vs. Cunningham*, (16 Ga. R. 102,) which see for the many instances there cited. In addition to which, see the Act of December 17th, 1825, making valid all bonds theretofore given in this State by administrators or guardians, payable to the Court of Ordinary, Members of the Inferior Court, Judges of the Inferior Court, &c.

For the reasons given therefore, we are of the opinion that the Act of 1852 is applicable to the agreement in question, and must control this case.

Judgment reversed.

Bass vs. Stevens et al.

No. 95.—NATHAN BASS, plaintiff in error, vs. ABSALOM STEVENS et al. defendants.

[1.] A plea to the jurisdiction being a dilatory plea, must be verified.

Certiorari, from Floyd Superior Court. Decision by Judge TRIPPE, December Term, 1854.

The point presented by this record is whether, in a Justice's Court, when a plea to the jurisdiction is filed, setting forth that defendant does not reside in the district, it is necessary that the plea be sworn to.

The Court below held, on *certiorari*, that such a plea cannot be filed except on oath; and this decision is alleged an error. The point arose in an action brought by Absalom Stevens against Nathan Bass, in a Justice's Court, who pleaded non-residence, but did not swear to the plea.

Judgment being given against him in the Justice's Court, Bass sued out a *certiorari* to the Superior Court, which *certiorari* was dismissed.

It was admitted, in the Superior Court, that Bass did not reside in Floyd County, but that the point was not raised in the Justice's Court, otherwise than by filing the plea.

PRINTUP, for plaintiff in error.

UNDERWOOD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This is a *certiorari* originating in the 962d district, G. M. Two questions have been discussed, one only of which we hold is legitimately made upon the record. Counsel insists that the account was not sufficiently proven. No objection of this kind was taken on the trial. Neither is this ground contained in the notice which the defendant gave to the plaintiff,

Mitchell vs. The Rome R. R. Co.

of his intention to apply for a certiorari. It comes, therefore, too late.

But concede that this point is properly made. The return of the Magistrate is as broad as the exception. The complaint is, that the demand was not sufficiently proven. No defect in the proof is specified. The return of the Justice certifies that it was sufficiently proven. If the return was too general, it should have been excepted to and the Magistrate required to answer over.

The only assignment then is, that the Court rendered a judgment without having jurisdiction of the person of the defendant. The facts are, that Bass was served, appeared at the docketing term and filed a plea that he was not a resident of Floyd, but of Bibb County. The plea was not sworn to. At the trial term, without resistance, the Court awarded judgment to the plaintiff. It could not do otherwise. The plea to the jurisdiction being a dilatory plea, had to be verified. It was not; and for this reason, the Circuit Court dismissed the certiorari; and we cannot do otherwise than affirm the judgment.

No. 96.—DANIEL R. MITCHELL, plaintiff in error, vs. THE ROME RAIL ROAD COMPANY, defendant.

[1.] A paper in the following words is, *prima facie*, a good promissory note, viz:

“Rome, September 10th 1846.

\$500. Due the Memphis Branch Rail Road and Steamboat Company of Georgia Five Hundred Dollars payable on demand. D. R. MITCHELL.”

[2.] A non-suit is not to be granted when the plaintiff has made out a *prima facie* case.

[3.] The sayings of a stockholder do not bind the corporation.

[4.] A new trial ought not to be granted by this Court, solely on the ground of the admission of evidence which is irrelevant.

[5.] A stockholder is a participant, the stock of whom they have acquired

Mitchell vs. The Rome R. R. Co.

not relieved from the payment of a note given by him for stock, although there may, after the time when his stock was forfeited, have been made a material alteration in the charter without his assent.

[8.] The fourth section of the Act to incorporate the Memphis Branch Rail Road & Steamboat Company of Georgia being in these words: "That the capital stock of said company shall consist of ten thousand shares of Fifty Dollars each, but the number of shares may be increased one third; and upon the subscription for shares in said stock, the subscribers shall pay the sum of Five Dollars upon each share subscribed for by such subscriber: Provided, that such company may commence the construction of their rail road and boating so soon as three thousand shall be subscribed." Held, that the payment of Five Dollars a share on the shares at the time of subscription, was not a condition *precedent* to the organization of the company or to the right of the company to begin boating and the construction of the rail road.

[7.] The charter of a corporation authorizes the corporation to "make contracts." The corporation takes a promissory note: Held, that *prima facie* the note is to be considered evidence of such a contract as the corporation was authorized to make.

[8.] A Court is not bound to give a charge on a point which is not supported by some evidence.

[9.] Under the aforesaid section of the charter, a subscription is not rendered void by the failure to pay Five Dollars a share on it at the time of the making of it. And therefore a note given to secure the payment, in part, of the subscription, is not void.

Action on note, in Floyd Superior Court. Tried before Judge TRIPPE, December Term, 1854.

The following is the bill of exceptions, which contains the facts of the case:

The suit was brought by the Rome Branch R. R. & Steamboat Company, upon the following note:

"ROME, SEPTEMBER 10th, 1846.

\$500. Due the Memphis Branch Rail Road & Steamboat Company of Georgia, Five Hundred Dollars, payable on demand. (Signed) D. R. MITCHELL."

"\$250. Cr. the within note by Two Hundred and Fifty Dollars upon Jas. J. Printup's note. J. E. PARK, Sec."

Mitchell vs. The Raas R. R. Co.

Defendant's Counsel objected to reading the same in evidence upon the following, among other grounds:

1st. Because the said Company, by its charter, had no right to enter into a contract of that character.

2d. That they had no right to take or give notes payable on demand,

3d. Because the paper offered in evidence did not express that it was given for value received—which objections were over-ruled by the Court, and the said note admitted in evidence—to which decision and ruling of said Court, admitting the said paper in evidence, Counsel for the defendant excepted.

The plaintiff closed the testimony, and the defendant moved to dismiss the case, upon the ground that the plaintiff had not made out, by the proof, such a case as entitled the said plaintiff to recover; which motion was over-ruled by the Court; to which decision and ruling defendant excepted.

The defendant then introduced the proceedings of a meeting held on the 10th of September, 1846—the minutes and proceedings thereof, which are as follows:

“ROME, SEPTEMBER 10th, 1846.

According to adjournment, the subscribers to the stock of the Memphis Branch Rail Road & Steamboat Company of Georgia met this day at the court-house. Philip C. Guin was called to the Chair and W. T. Trammell requested to act as Secretary. The object of the meeting was explained by Judge King, to be to ascertain the progress made in the subscription of stock, and for the construction, and then to proceed to the organization of the Company. It was determined by the meeting that the conditional subscription to the stock previously made should be laid aside, and that the commissioners appointed to receive subscription should be requested to open a book of subscription in strict accordance with the charter—this was done. The number of shares required by the charter for the organization of the company having been subscribed, the commissioners stated that fact to the meeting; and besides, that the first instalment required to be paid by the charter had been

Mitchell vs. The Rome R. R. Co.

paid in and was in their possession and ready to be disposed of, as the meeting should direct. The meeting of the subscribers took into consideration the statements placed before it, and on motion, it was unanimously agreed that the meeting of subscribers should resolve itself into a convention of stockholders of the Memphis Branch Rail Road & Steamboat Company of Georgia. It was then moved that the number of directors should be seven, and that as the regular number of shares had been subscribed and the first instalment paid in, agreeably to the provisions of the charter, on motion of Judge King, *Resolved*, That the number of directors of this company consist of seven members, any four of whom, or three besides the president, should constitute a quorum. The motion was agreed to, and the stockholders proceeded to the choice of directors—on counting out the ballots, it appeared that Messrs. Jno. P. King, Daniel Tyler, W. R. Smith, Alfred Shorter, D. R. Mitchell, John E. Park and J. W. M. Berrien had received a large majority of the shares.

These gentlemen were therefore declared to be elected directors of the Memphis Branch Rail Road and Steamboat Company of Georgia for one year from this date. On motion of D. R. Mitchell, Esq. *Resolved*, by the stockholders of the Memphis Branch Rail Road and Steamboat Company of Georgia, that the stockholders shall not be required, by any order of the board of directors, to pay any funds for the purpose of constructing of said road farther west than the town of Rome, without the unanimous consent of the stockholders given at a regular meeting of the same—passed. On motion, the meeting adjourned.

P. C. GWIN, Chm'n.

W. T. TRAMMELL, Sec."

At a meeting of the directors on the 27th Sept. 1848, it appearing to the board that Jno. P. King, for Daniel Tyler, subscribed seven hundred and fifty shares to the stock of the company and paid five dollars per share thereon—it farther appearing that said Tyler has not recognized said subscription or

Mitchell vs. The Rome R. R. Co.

refunded the said advance, it is ordered that said stock be transferred to the individual name of the said King, and the said subscription be taken, deemed and considered the individual subscription of the said King, provided, however, the said King shall return, to be cancelled, the original subscription in the name of said Tyler.

8th NOVEMBER, 1848.

Resolved, That the company accept the amendments to the charter, authorized by the Legislature of Georgia, by Act approved 29th Dec. 1847.

12th MARCH, 1850.

Resolved, That this convention accept the amendment of the charter of this company, authorized by the Legislature.

The cost of the road was admitted to be One Hundred and Forty Thousand Dollars.

The defendant then offered in evidence an extract from the minutes and proceedings of the company on the 14th day of April, 1846, as follows:

The undersigned, a portion of the original contractors of the Rome & Memphis Branch Rail Road Company of Georgia, having this day met in the town of Rome for the purpose of taking preparatory steps for the permanent organization of said company, have resolved to open books of subscription for the capital stock of said company, the subscription to the stock to be valid and binding on the subscribers for the stock, only on condition that Alfred Shorter, J. W. M. Berrien and William Nesbit sign the relinquishment this day drawn up for their signature, relinquishing all their title, interest and claim in and to the said charter, and on condition that the requisite amount of stock be subscribed to authorize a legal and permanent organization of the said company; and on the further condition, that the subscribers for stock be permitted to pay their instalments in work upon the road in grading, bridging,

Mitchell vs. The Rome R. R. Co.

getting timber, &c. for superstructure at cash prices; and should the Ga. Rail Road Company and Macon & Western Rail Road Co. or other rail road companies be subscribers for stock, that the said company be allowed to pay the instalments that may become due on their stock subscribed, in iron, gudgeons, cars, &c. of good and substantial quality—the value of the same to be determined by competent and disinterested judges, at cash rates, except such an amount of cash as may be necessary to pay the salaries of engineers and agents and for the right of way, which is to be advanced by said company, until the road is put in operation. And should the subscribers for stock and the said rail road companies fail to pay in work as above, and in iron, &c. as above, when required, legally, by the directors hereafter to be appointed for the management of the said Rome & Memphis Branch Rail Road Co. then they will respectively be required to pay their subscription in cash, or instalments thereon as the same may be ordered and required by the board of directors.

Signed,

D. R. MITCHELL,
EDWARD WARE,
JOSEPH WATERS,

Corporators.

JOHN SMITH,

At a meeting of directors 7th April, 1847, the following resolution was passed:

Resolved, That the company adopt a good second hand rail road iron, not less than $2\frac{1}{2}$ by $\frac{1}{8}$ of an inch thick, at \$60 per ton, delivered at Kingston, as was proposed by Col. King, subject to the inspection of the Chief Engineer.

At a meeting 28th April, 1847—

Resolved, That the President of the Memphis Branch Rail Road & Steamboat Co. of Ga. be authorized to receive from Euben Herndon his certificate of stock and deliver to him his ten per cent. note—1st. Because his subscription is worthless and never will be complied with. 2d. Because it is deemed

Mitchell vs. The Rome R. R. Co.

material to have said Herndon's testimony in the appeal case of Benjamin Reynolds vs. the Company, to be tried on Friday next,

The defendant then offered to prove by N. Yarbrough and A. T. Hardin, that the subscription of Daniel R. Mitchell was made upon the express condition that the depot was to be located in the upper end of the City of Rome, near where the Presbyterian Church now stands, near to some property in which he, Mitchell, was interested, and this was stated publicly in a meeting, by John P. King, a large stockholder and principal mover in organizing the said company, and that King stated in the meeting, and pledged himself, that all the road cost over \$70,000 he, King, would pay; which being objected to by the plaintiff, was rejected by the Court. Defendant excepted.

The following is the testimony for the defendant:

W. T. Trammell sworn, says: That he acted as secretary at the meeting 10th Sept. 1846; that there was no money paid or offered to be paid, as he saw or heard of.

Nathan Yarbrough sworn, testified: That he was present at the first and second meetings of the company, and no money was paid or offered to be paid; that the paper in evidence, upon which the suit was instituted, was given in place of payment in cash of the first instalment for stock; that he had no recollection that any certificate of stock was ever given to the defendant; that the removal of the depot, or the location at the fork of the river instead of the place near the Presbyterian Church, depreciated property in the upper part of Rome, where Mitchell was interested, fifty per cent.; that those who applied for certificates of stock obtained them and gave their notes; have no recollection of the defendant getting any certificate.

A. T. Hardin testified: That he was present at the meetings organizing the Company; that no money was paid or offered to be paid; that this note and others were given for stock.

Mitchell vs. The Rome R. R. Co.

SEPT. 11, 1846.

Present—Directors John P. King, A. Shorter, D. R. Mitchell and J. W. M. Berrien.

Resolved, That the stockholders of this company having paid Five Dollars per share upon the subscription for their stock, according to the terms of their charter, and the said company having no immediate use for the money, it is *Resolved*, That the same be loaned out to the stockholders who may desire it, in proportion to their subscription, and upon their notes to the company, payable on demand.

The minutes show that half of Mitchell's stock was transferred to Printup (Jos. J. Printup).

The defendant then read in evidence the Act of the Legislature, passed in 1839, entitled an Act to incorporate the Memphis Branch Rail Road & Steamboat Company of Georgia; also an Act passed in 1845, amendatory thereof; and also an Act passed in 1850, to incorporate The Coosa River Steamboat Company; and also an Act of 1850, to amend the charter and change the corporate name of the Memphis Branch Rail Road & Steamboat Company of Georgia. It is admitted that the stock of the defendant had been forfeited before the passage of the two last named Acts.

The plaintiff, in rebuttal, introduced *Sterling T. Combs*, who testified: He was present at the meetings organizing the company; that Judge King offered to loan the money to all who did not have it, to pay the five per cent.; that King did loan witness money; whether he loaned any body else money or not, he did not know; there was a sealed package which King laid down and took up again, which he supposed, or understood, contained money, but does not know; and also, that the reason for the indulgence, his taking notes instead of the money, was in order that the stockholders might work out the stock at cash prices.

Joseph J. Printup testified: That the credit of \$250 on the

Mitchell vs. The Rome R. R. Co.

note sued on, was put there by the assent and direction of Mitchell.

Extract from minutes of Beard, 4th November, 1846:

On motion of Col. Mitchell, that the Board organize and proceed to business, when the subject of prices for grading was fully discussed.

John P. King submitted a list of prices and moved their adoption. D. R. Mitchell offered an amendment, by striking out 8 cents per yard for grading and inserting 10; and striking out 12½ cents for cross-ties and inserting 15 cents, which was lost.

Defendant's Counsel objected to the introduction of this evidence by the plaintiff, on the ground that they had no right to introduce their minutes in evidence for themselves; which objection was overruled by the Court and the evidence read to the Jury. To which decision and ruling of the Court defendant excepts, and alleges the same to be error.

Exhibit from one of the plaintiff's small books, said exhibit having no date:

Subscribers to the Memphis Branch Rail Road & Steamboat Company of Georgia:

We, the subscribers, hereby subscribe the number of shares opposite to our names, in the Memphis Branch Rail Road & Steamboat Company, and promise to comply with the provisions of the charter.

Alfred Shorter, Four Hundred Shares.	400
John P. King, Seven Hundred and Fifty.	750
D. Tyler, per King, Seven Hundred and Fifty.	750
D. R. Mitchell, One Hundred.	100
And others.	

The above was introduced by defendant.

Counsel for the defendant, among other things, asked the

Mitchell vs. The Rome R. R. Co.

Court to charge the Jury, that any material or essential alteration of the charter (original) without the assent of the defendant, relieves him from the payment of this note, which was refused by the Court; to which refusal to charge, Counsel for the defendant then and there excepted, and now in this Court excepts and alleges the same to be error.

Counsel for the defendant also requested the Court to charge the Jury, that the Act of 1850, entitled an Act to incorporate the Coosa River Steamboat Co. and the rights thereby conferred upon the corporation therein mentioned, was such an essential and material alteration as will relieve the defendant; which charge the Court refused to give; to which refusal to charge, Counsel for defendant then and there excepted, and now in this Court excepts, and alleges the same to be error.

Counsel for the defendant also asked the Court to charge the Jury, that the Act of 1850, amending the charter and changing the name of the (same) Memphis Branch Rail Road & Steamboat Company of Georgia, thereby in effect yielding up all the right the said corporation had in the navigation of the Coosa river, was such an alteration as will relieve the defendant, unless it was made with his assent; which charge the Court refused to make; to which refusal to charge Counsel for the defendant then and there excepted, and now in this Court excepts, and alleges the same to be error. Counsel for the defendant also asked the Court to charge the Jury, that the plaintiff had no power, under this charter, either to give or take notes payable on demand, unless it is expressly given, and that no such power is to be found in the charter; which charge was given with the addition, "unless in the prosecution of the business of the corporation;" to which charge thus given, or the addition to the request, Counsel for the defendant then and there excepted, and now in this Court excepts, and alleges the same to be error.

Counsel for the defendant also asked the Court to charge the Jury, if the Jury believe from the evidence, that the amount required to be paid in before the organization of the company was not paid in, the organization was not legal, and

Mitchell *vs.* The Rome R. R. Co.

the acts done under such organizations are not binding; which the Court refused to do, and charged, that if defendant participated in said organization; and also acted as a director for some time, he cannot now object—the defendant excepted.

Counsel for the defendant also asked the Court to charge the Jury, that the giving or taking a note payable on demand for money loaned, is not within the scope of the design or authority of the corporation, the plaintiffs in the action, which the Court gave, with the qualification—1st. Was this note for the purpose of the corporation? The presumption of the law is in favor of the note—has the defendant proved that it was given for purposes foreign to the object of the Corporation? To which refusal to charge as requested, in the language requested, and the qualification thereof, the defendant excepted.

Counsel for the defendant also asked the Court to charge the Jury, that if the Jury believe the note was given for loaned money, it is void; which charge the Court gave with the following qualification: "If the note sued on was given by Mitchell and accepted by the company, in lieu of and instead of money, as a payment for stock, and Mitchell was present witness thereto, and acting for some time thereafter as one of the directors, he was bound to pay said note, and cannot now object to the payment thereof." To which refusal to charge, in the language and as requested, and to the qualification thereof, defendant excepted.

Counsel for the defendant also requested the Court to charge the Jury, that if the note is to be received as a subscription for stock, then the material alteration in the charter alluded to in the former request to charge, will discharge the defendant, unless his assent to the alteration is proven; which charge the Court refused to give; to which refusal to charge the defendant excepted.

Counsel for the defendant also requested the Court to charge the Jury, that the Act of 1859 before mentioned, (changing name, &c.) is a material alteration of the charter, and discharges the one as will discharge the defendant from the obligation the

Mitchell vs. The Rome R. R. Co.

stock; which charge the Court refused to give; to which refusal to charge the defendant excepted.

The Jury returned a verdict for the plaintiff for \$250, with interest and cost of suit.

ALEXANDER & UNDERWOOD, for plaintiff in error.

PRINTUP, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The first assignment of error is, that the Court below permitted the "paper or note described in the declaration" to be read as evidence to the Jury.

That paper or note is in the following words:

"ROME, SEPTEMBER 10th, 1846.

\$500. Due the Memphis Branch Rail Road & Steamboat Company of Georgia, Five Hundred Dollars, payable on demand.

D. R. MITCHELL."

The objections made to the admission of this paper in evidence, may be resolved into two. 1. That the charter did not authorize the company to take such a note. 2. That if the charter did this, the note, itself, was not expressed to be on consideration.

The charter contains this section: "That the company aforesaid, shall be deemed a common carrier, as respects all goods, wares, merchandise and produce entrusted to them for transportation; and shall have full power and authority to do and perform all and every corporate acts as are permitted or allowed to other companies incorporated for similar purposes." (Acts of 1845, 169.)

Among "other companies incorporated for similar purposes," no doubt, be included the Central Rail Road & Banking.

Mitchell vs. The Rome R. R. Co.

Company of Georgia, and the Macon and Western Rail Road Company. And these companies, by their charters, have the general power to "make contracts." (*Pr. Dig.* 300, 326, 314. *Pamph. Acts* 1847, 181.)

A promissory note is a contract.

These companies, therefore, have power, respectively, to be a party to a promissory note.

And so, therefore, was the company that is the defendant in error in this case.

The first objection, then, to the admission of the note was not a good one.

Neither was the second. This was a promissory note, although no consideration was mentioned in it. (*Waithman vs. Elset*, 1 Carr. & Kerw. 35. *Curtis vs. Rickards*, 1 Mann. & Granger, 46. *Story's Prom. Notes*, §§14, 181. *Chitty on Bills*, 79.)

[1.] The Court below was right, therefore, in admitting the note to the Jury.

[2.] And if right in that, the Court was also of course right, in over-ruling the motion to dismiss the case, on the alleged ground of a want of evidence to support the case. The note was, *prima facie*, sufficient to support the plaintiff's case.

For aught that appears, the statements of John P. King were not authorized by the company; if not, they were not binding on the company. Therefore, it was right in the Court below not to let his statements go to the Jury as evidence against the company.

[3.] The sayings of a stockholder do not bind the corporation.

[4.] The extract from the minutes of the corporation which the Court below admitted to the Jury as evidence, was merely irrelevant. And though irrelevant evidence is illegal evidence; yet, a new trial ought not to be granted solely on the ground of the admission of such evidence. In such a case, the presumption, at least *prima facie* is, that the evidence, as it cannot legally, so it does not actually, influence the Jury, in the formation of their verdict.

Mitchell *vs.* The Rome R. R. Co.

In this case, there appears nothing to rebut this presumption.

Therefore, the fourth assignment of error is not a good one.

Had a motion been made in the Court below for a new trial, on this ground, the decision of this Court would, under the New Trial Act of 1853-'4, have had to be different.

The next assignment of error is, that the Court below erred in refusing to charge the Jury, that any material or essential alteration of the original charter, without the assent of the defendant, (Mitchell,) relieved him from the payment of the note.

Before the alterations referred to had been made, the stock of the plaintiff in error, Mitchell, had been forfeited to the company, and he had therefore, ceased to be a stockholder in the company.

It appears, from the evidence of Yarbrough and Hardin, that this note had been given by Mitchell, "in place of payment in cash, of the first instalment for stock."

Still, as Mitchell had ceased to be a stockholder in the company, at the time when the alterations in its charter were made, his assent or dissent to those alterations was a matter of no consequence. Assent or dissent to them was a matter solely for the persons who, at the time of the alterations, were the stockholders.

[5.] This being so, the liability of Mitchell to pay the note would not at all be affected by the alteration in the charter. The note stood in the place of so much cash paid in. And by the alteration in the charter, Mitchell no more got the right to be exempted from liability to pay the note than he would if, instead of giving a note, he had paid the money, have got the right to have back the money.

This assignment of error is therefore not well founded.

For the same reasons, neither are the next two assignments.

The next assignment of error, after those two, is the refusal of the Court to charge the Jury, without qualification, that the company had no power, under their charter, either to give or to take notes payable on demand. The Court gave this charge

Mitchell *vs.* The Rome R. R. Co.

with the qualification, "unless in the prosecution of the business of the corporation."

We have already, in considering the first assignment of error, seen that the company had the general power to "make contracts." And the conclusion we draw from that was, that the company had the right to be a party to a promissory note, because that is a contract.

In addition to what was said on that assignment, it may be said here, that the sixth section of the charter impliedly confers on the company the power "to give" promissory notes. That section has in it these words: "and the evidences of debt of said company shall be binding only on the funds of said company, when signed by the President and attested by the Secretary and Treasurer."

The Court below, then, might well have refused to give this charge, even with a qualification.

The next assignment of error is, that the Court refused to charge, that if "the amount required to be paid in before the organization, was not paid in, the organization was not legal, and the acts done under such organization are not binding"—and instead, charged, "that if defendant participated in said organization and acted as a director for some time," he could not then object to the organization.

The words of the charter which seem to bear upon this point, are the following: "Sec. 4. *And be it further enacted by the authority aforesaid,* that the capital stock of said company shall consist of ten thousand shares of fifty dollars each; but the number of shares may be increased one third; and upon the subscription for shares in said stock, the subscribers shall pay the sum of five dollars upon each share subscribed for by such subscriber: *Provided,* that said company may commence the construction of their rail road and boating, so soon as three thousand shall be subscribed."

The payment of the five dollars on each share, at the time of subscription, is not, by this section, made a condition precedent, either to the existence of the company as a corporation, or to its right, as a corporation, to commence business. In

Mitchell vs. The Roine R. R. Co.

deed, the first section of the Act had expressly made the company a corporation. And the proviso in this section authorizes it to commence boasting and the construction of the road, as soon as three thousand shares should be *subscribed*. According to the proviso, the company did not have to wait, not only until it had got three thousand shares subscribed, but also until it had received five dollars on each of the three thousand shares, before it could begin business.

And if these things be so, the payment of five dollars a share on the subscriptions, at the time of the subscriptions, was not a condition *precedent* to the organization of the company as a corporation. And for this reason, the Court below would have been justified in its refusal to give the charge. Doubtless, if this payment were a condition *precedent* to organization, the acts done by the company, unless this condition had been complied with, would be void; and *void*, notwithstanding any subscriber might have participated in them and given them his sanction; or might have taken part in any pretended organization, and even have become a director under a pretended organization. To this effect is the decision of this Court in *Napier et al. vs. Poe et al.* (12 Ga. R. 184), a case, in which the payment in of a certain per cent, by the subscribers for stock, was a condition *precedent* to organization or to the right to do business.

But although we cannot sanction the reason given by the Court for its refusal to make this charge, we have to sanction the refusal itself, because that, it appears to us, was right, for the reason which we have given—the reason, that the payment of the five dollars was not a condition *precedent* to organization.

The next assignment of error, is the refusal of the Court to charge, unqualifiedly, "that the giving or taking a note, payable on demand, for money loaned, is not within the scope of the design or the authority of the corporation, the plaintiff is the action." The Court qualified this by adding to it, that the presumption of law was in favor of the notes having been given for the purposes and objects of the corporation, i. e. as we understand, the addition—in favor of the notes having been given

Mitchell vs. The Rome R. R. Co.

as a means to accomplish some of the authorized ends of the corporation.

And we think the Court was right in making this addition to the charge.

[7.] The charter, as we have again and again seen, authorizes the corporation, in general terms, to "make contracts." Therefore, contracts made by it which, like promissory notes, do not, on their face, disclose the objects for which they were made, are, it is to be presumed, until the contrary be shown, such as the charter authorizes it to make. No person, whether artificial or natural, is to be held to be a law-breaker, without some proof to show that he is one.

The next assignment of error, is the refusal of the Court to charge, unqualifiedly, that if "the note was given for loaned money, it is void."

[8.] This charge the Court, we think, was warranted in not giving, by the absence of evidence on which the charge might stand. There was no evidence that the note was given for "loaned money." The resolution authorizing the money paid in for stock to be loaned back to the stockholders, was passed the day after the date of this note.

Besides, there is the positive testimony of two witnesses, Warbrough and Hardin, that the note was given for stock.

Instead of making this charge, the Court charged, that if the note was given as a payment for stock, and Mitchell "was present, assenting thereto, and acted, for sometime thereafter, as one of the directors, he is bound to pay the note."

[9.] The fourth section of the charter does not say that subscriptions on which, at the time of subscription, five dollars a share shall not have been paid, shall be void. On the contrary, it says what is equivalent to saying, that even in that case, they shall not be void; for it says that the company may begin boating and the construction of the rail road as soon as three thousand shares shall have been subscribed. It must therefore consider subscriptions good, whether five dollars a share has been paid on them or not. If so, it follows that the company have the right to collect such subscriptions; and if they

Mitchell *vs.* The Rome R. R. Co.

have the right to collect them, they have, as an incident, the right to give terms on which the subscribers may pay them; or, at least, they have the right to *secure* their collection by taking promissory notes for their payment. If the subscription is good, the note is good—for the note is only to secure the subscription.

Suppose, after subscribing, a subscriber *refuses* to pay the five dollars a share? Is the company powerless? Is the company to lose the subscription? Cannot the company enforce the subscription? Wherefore is it, that the company can enforce subsequent instalments of stock, if it cannot enforce the first one?

And there is not the same reason why the payment of the stock, or some part of it, in a rail road corporation, should be made a condition precedent to the corporation's going into operation, than there is why the payment of the stock, or some part of it, in a banking corporation, should be made a condition precedent to such a corporation's going into operation. If a corporation of the latter sort fails, the public suffers—if one of the former sort, only the stockholders. This, at least, is generally true.

The last two assignments of error are, with respect to the effect of the alteration of the charter on Mitchell's liability. The effect of the alteration on that, has already been considered.

Upon the whole, we think there should be a general affirmation of the decisions of the Court below.

Waters, Sheriff, *et al.* vs. Greenway Bros. & Co.

No. 97.—THOS. G. WATERS, Sheriff, *et al.* plaintiffs in error,
vs. GREENWAY BROTHERS & CO. defendants.

[1.] Where a client does not participate in a fund brought into Court, but is postponed to older liens, the Attorney is not entitled to commissions upon the money.

Rule, in Floyd Superior Court. Decided by Judge TRIPPE,
December Term, 1854.

A sum of \$1100 had been raised by levy and sale, by order of Court, under an attachment in favor of Fellows & Co. against A. J. Murray, of the goods and chattels of said Murray.

The money was claimed by *f. fas.* of older date than the attachment in favor of Greenway Brothers & Co. and D. C. Hide & Co. against the firm of Burns & Murray; of which firm A. J. Murray was a party.

The Counsel of Fellows & Co. contended that they were entitled to five per cent. of the amount, for having raised and brought the money into Court. This was refused by the Court, and this decision is assigned as error.

UNDERWOOD, for plaintiff in error.

PRINTUP, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] A large amount of money, to-wit: \$1119, having been raised under an attachment, at the instance of Fellows & Co. against Andrew J. Murray, was brought into Court by the Sheriff and ordered to be paid over to executions of an older date, in favor of Greenway Brothers and Co. and D. C. Hide & Co. against Burns & Murray.

Before applying the fund to these prior liens, Counsel for Fellows & Co. claimed to have their commissions allowed upon

Johnson et al. vs. Mitchell.

the fund, but were refused by the Court, upon the ground, that as their client got no money, the Attorneys were not entitled to fees. And we see no error in the judgment. It does not conflict with the opinion of this Court in *McDonald and Napier*, (14 Ga. R. 89.)

No. 98.—RILEY J. JOHNSON, *et al.* plaintiffs in error, *vs.*
DANIEL R. MITCHELL, defendant.

[1.] As between judgments obtained in different Courts, or at different terms of the same Court, the first signed is prior in point of time.

Certiorari, from Floyd Superior Court. Decision by Judge TRIPPE, December Term, 1854.

This was a *certiorari* from a decision of a Justice's Court, on a motion to distribute money. Riley J. Johnson held a *sum. f. fa.* from the Justice's Court, against Logan White, dated 26th February, 1853. Daniel R. Mitchell held a *f. fa.* from the Superior Court against Logan White, on a judgment signed on the 14th March, 1853. The confession of judgment, on which the judgment was entered, was dated February 28th, 1853, and the term of the Superior Court at which it was obtained, commenced on the 21st February, 1853. The Justice's Court decided that the Justice's Court *f. fa.* were entitled to the money.

On *certiorari*, the Judge reversed this decision, and awarded the money to the Superior Court *f. fa.*, holding that the date of the judgment took date from the first day of the term; or if not, then from the date of the confession of judgment. *Abd. on this decision error is assigned.*

Johnson et al. vs. Mitchell.

ALEXANDER, for plaintiff in error.

UNDERWOOD, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] At Common Law, a judgment by general intendment of law, related to the first day of the term. (2 *Tidd. Pr.* 965, 967.) By the 16th section of the Statute of Frauds, (26 Ch. 2 Ch. 3) lands were bound from the signing of the judgment, *as to purchasers*, and personal property from the delivery of the execution to the Sheriff.

The 26th section of our Judiciary Act of 1799 declares, that “all the property of the party against whom such verdict shall be entered, shall be bound from the signing of the first judgment; but where several judgments shall be of equal date, the first execution delivered to the Sheriff shall be first satisfied.” And this Act, in our opinion, effectually repealed the Common Law rule, and the provisions of the Statute of Frauds, above cited. Such has been the almost uniform construction given to that Act, we believe.

The 2d section of the Act of 1822, declaring that “all judgments signed on verdicts rendered at the same term of the Court, be considered, held and taken to be of equal date; and no execution founded on said judgments, obtained at the said term as aforesaid, shall be entitled to any preference by reason of being first placed in the hands of the officer,” again modified the Statute of 1799, and made all judgments of equal date and effect, which were obtained at the same term of the Court; thus, in effect, restoring the Common Law rule just mentioned, as to such judgments; but as to all others, leaving the provision of the Act of 1799, that all the property of the defendant shall be bound from the signing of the first judgment, in full effect.

This provision must control the question before us, where the contest is between the liens of two judgments obtained in dif-

Norwood *et al.* Hardy *et al.*

several Courts; and the funds raised in this case must be paid to the *pro fisc.* issued from the Justice's Court, they being first signed.

We knew that accurate justice may not be insured by these provisions of the law. We think, however, that we could readily show, by illustration, that perhaps greater inconveniences would result from a different rule. But we will not pause for this, as the law is, in our judgment, so written and must be obeyed, whatever may be thought of its perfection.

Judgment reversed.

No. 99.—JAMES NORWOOD, plaintiff in error, vs. LEWIS HARDY, *et al.* defendants.

[1.] The "physician" intended by the Act of 1834, concerning commissions of lunacy, is a person who has been licensed as a physician by the board of physicians of this State.

Inquisition of lunacy, in Jackson Superior Court. Decided by Judge JACKSON, February Term, 1855.

The record in this case disclosed the following facts: In 1851, James Norwood applied to the Court of Ordinary of Jackson County for a commission to examine Lewis Hardy, alleged to be insane and incapable of managing his affairs. Notice of this application had been previously given to Isaac M. David, the son-in-law, and Amisted Hardy and Parmelia Denson, the son and daughter of Lewis Hardy.

Twelve commissioners were appointed, who, after examination, returned a verdict that the said Lewis Hardy was insane and incapable of managing his own affairs; and the Court of Ordinary appointed Norwood his guardian. Lewis Hardy, by

Norwood *vs.* Hardy *et al.*

his next friend, Thos. Stapler, appealed from the verdict to the Superior Court. At Feb. Term, 1855, Counsel for the appellant moved to dismiss the proceedings as being void on two grounds—1st. That the wife of Lewis Hardy was not notified of the intended application. 2d. That no physician was of the number of commissioners who tried the case, as required by the Statute.

It was admitted that the wife of Lewis Hardy had not been notified; and that W. B. Hardeman, one of the commissioners, was practising as a regular physician and had received a diploma from Jefferson Medical College of Philadelphia, but had never, up to the time of said trial, obtained a license from any board of physicians in Georgia—no other physician was among the commissioners.

The Court sustained the motion on both the grounds, and dismissed the proceedings at the cost of the applicant. And on this decision error is assigned.

OVERBY, for plaintiff in error.

COBB & HULL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The Act under which this case proceeded, provides that one of the commissioners “shall be a physician.” (*Cobb's Digest*, 843.)

Was Wm. B. Hardeman a physician?

He, though practising and holding a diploma from “Jefferson Medical College of Philadelphia,” has never been licensed as a physician by “the Board of Physicians of this State.”

The first section of the Act of 1825, “to regulate the licensing of physicians,” &c. contains these words: “no person shall be allowed to practice physic and surgery, or any of the branches thereof, or in any cases prescribe for the cure of any diseases for fee or reward, unless he or they shall have been licensed to do so, in the manner hereinafter prescribed.”

Notwood *vs.* Hardy *et al.*

(*Cobb's Digest*, 886.) This Act, after being repealed in 1836, was revived by the Act of 1839, and again by the Act of 1847. (*Id.* 889.)

Now the question is, when the Legislature declares that a physician was to be one of the commissioners, did it mean some person only who had obtained a license to practice physic from the board of physicians, or did it mean such person and any other who might have obtained such license from some foreign board of physicians or some foreign medical school or institution?

And in the opinion of this Court, the Legislature must have meant a person of the former sort and no other. When the Legislature speaks of Judges, Justices of the Peace; Clerks, Sheriffs, Executors, Administrators, Guardians; Jurors, Voters—citizens even, it means, unless there is something decisive to show the contrary, persons who are such, respectively, by the laws of Georgia. So, when it mentions physicians, it must be considered to mean only persons who it has said shall be considered worthy to act as physicians—and who are they? Only such as the board of physicians may have licensed to practice physic for it is only said that the Legislature has allowed to charge for their services; and therefore, it must be only such that the Legislature consider capable of rendering services of any value. It is to be presumed, that if the Legislature had considered others capable of rendering services of any value, it would have allowed them to be paid for such services.

It follows, that in the opinion of this Court, the Court below was right in dismissing the case on one of the grounds, that Hardeman had not been licensed as a physician by the board of physicians of this State.

And this renders it unnecessary to decide the sufficiency of the other ground on which the case was dismissed.

So the judgment of the Court below ought to be affirmed, we

etc. etc. 175
etc. etc. 176
etc. etc. 177

Rogers vs. Solomons et al. &c.

No. 100.—JOB ROGERS, plaintiff in error, vs. WM. SOLOMONS et al. administrators, &c. defendants. WM. SOLOMONS et al. administrators, &c. plaintiffs in error, vs. JOB ROGERS, defendant.

[1.] With respect to the allowance or disallowance of supplemental bills, Courts of Equity ought to follow the Statute of Amendments of 20th February, 1854.

[2.] When a supplemental bill has been allowed, the injunction in the original bill should not be dissolved until the equity contained in the supplemental bill, as well as that contained in the original bill, has been removed.

In Equity, in Floyd Superior Court. Decision by Judge TRIPPE, November Term, 1854.

The facts of this case are fully set forth in 14th Ga. R. p. 320, except that when Atkinson, administrator, &c. obtained the judgment against Rogers and the executors of Hargrove, the appeal was entered by the executors of Hargrove alone. It seemed, however, that all parties had acted on the opinion, that the appeal operated for all the defendants. With this exception the facts are correctly stated. After the decision of the Supreme Court, reported in the 14th Vol. no further steps were taken in the cause until November Term, 1854, when the complainant, Rogers, offered the same matter which he had previously moved as an amendment, in the shape of a supplemental bill, supported by affidavit. This application was refused by the Court; to which decision the complainant excepts.

Thereupon, the respondents moved to dissolve the injunction, on the following grounds:

1st. That all the equity in the bill is sworn off by the answer;

2d. That the complainant has no interest in it, as he had not appealed; and the judgment was final and conclusive, as to him, and fixed his liability before the agreement was made, which is sought to be enforced and reformed; and he was fixed

Rogers v. Solomons et al. &c.

as a principal, in the verdict of the Jury and judgment of the Court, he having been sued as a partner and principal.

3d. That many of the important facts stated in the bill, are stated and sworn to, on information and belief alone.

This motion was over-ruled by the Court; and to this decision the respondents excepted.

UNDERWOOD: ALEXANDER, for Rogers.

ALEX: McDONALD, for Solomons.

By the Court.—BANKING, J., delivering the opinion.

I shall first consider the case of Rogers against Solomons and others.

In that case, the sole question is, whether Rogers should have been allowed to file the supplemental bill?

We think that if the allegations in the supplemental bill be true, equity is in that bill.

And that being so, the supplemental bill ought to have been allowed, as a matter of course, unless some special reason existed to make the allowance of it improper.

[1.] Did any such reason exist? Perhaps there did until the passage of the Act of the last Legislature on the subject of amendments. (*Pamph. 1858-'4, 48.*) By that Act, parties, whether at Law or in Equity, may, in any stage of the cause, amend their pleadings in all respects, whether in matter of form or matter of substance.

Now the difference between a supplemental bill and an amendment to the bill, is, for all practical purposes, merely technical. Under the maxim, therefore, that Equity follows the Law, Courts of Equity ought, as to supplemental bills, to follow this Statute as to amendments.

And, indeed, the matter of this supplemental bill is such matter as is suitable for introduction into the bill by way of amendment. (*1 Daniel's Ch. Pr. 510, 511.*) And by the Statute aforesaid, the time for amending a suit going by, this

Paxton, Bailey and Park.

matter, should this supplemental bill be refused, would, if the plaintiff wished it, have to be introduced into the bill by way of amendment! To refuse the supplemental bill, therefore, would be merely to produce double trouble and additional expense and more delay.

We think the supplemental bill ought to have been allowed; and so, that the judgment of the Court below, in this case, ought to be reversed.

[2.] And this, in effect, disposes of the case of Solomons and others against Rogers; for if the supplemental bill had been allowed, as it should have been, then the plaintiffs' case would have become such that the injunction should not be dissolved until the equity of that supplemental bill should have been tested out. The supplemental bill would have made the plaintiffs' such as to call for a new answer.

We think, therefore, that it is well that the Court below refused to dissolve the injunction.

And we do, therefore, reverse the judgment of the Court below, and remand the cause to the Superior Court of Fulton County, with directions to dissolve the injunction.

No. 101.—JAMES A. PAXSON, plaintiff in error, vs. A. P. BAXTER, J. M. LEX and THOS. J. PARK defendants.

[1.] A vendee entering into the possession of land under a bond for title, does not hold adversely against the vendor until the purchase money is paid. In such case, the possession of the vendee is not only consistent with the title of the vendor, but the very bond which incorporates certain covenants of title, recognizes,承认, the title in the vendor. [1. United States, 122.] Adverse possession is equally a mixed question of law and fact, for the facts exist which constitute adverse possession, is for the Jury to judge. Whether, assuming the facts proven to be true, they constitute adverse possession, is for the Court to decide.

To whom would a mechanics and materialman have a right of ejectment, in Georgia Superior Courts? District Attorney, Sheriff, State or county auditor and audit officer, etc., etc.

Paxson *vs.* Bailey and Park.

This was ejectment, brought by Paxson against Bailey, to which Park was made co-defendant.

The plaintiff produced a bond for titles to the land in dispute, dated in 1837, to the plaintiff, Paxson, together with W. J. Howell and J. Day, conditioned to make titles thereto, when the purchase money should be paid. Paxson was shown to have held possession by his tenants from 1837 to 1848, but there was no proof of payment of the purchase money.

When the plaintiff had closed his case, the Court, on motion, entered a non-suit, on the ground that a bond for titles, without payment of the purchase money, was not color of title for the obligee, against the obligor, and that possession in such a case is not adverse.

This decision is excepted to, on the ground that the Court has no right to order a non-suit; that whether the possession was adverse or not, is to be judged of by the Jury; and that the non-suit was improperly awarded.

WRIGHT & SWIFT; MILNER, for plaintiff in error.

DABNEY; WALKER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We see nothing in the facts of this case to take it out of the rule laid down by this Court in *Stamper et al. vs. Griffin*, (12 Ga. Rep. 450) namely: that a vendee entering into the possession of land, under a bond for titles, to be executed at a time stipulated, does not hold adversely against the vendor, until the purchase money is paid. In such case, the possession of the vendee is not only consistent with the title of the vendor, but the very bond which was produced on the trial by the occupier, distinctly acknowledges the vendor's title.

[2.] Adverse possession is a mixed question of law and fact, to be left to the Jury, under the instruction of the Court.

Kerley vs. Richardson.

Whether a given state of facts exist which constitute adverse possession, the Jury are to judge. But assuming all the facts proven to be true, whether they amount to adverse possession, is unquestionably a matter of law for the Court to decide. And it has done no more in the present case.

No. 102.—JOHN KERLEY, plaintiff in error, *vs.* E. H. RICHARDSON, defendant.

[1.] A sells to B a number of lots of land and gives B his bond to make him title on payment of the purchase money. As to one of the lots a grant from the State has never issued, but A has a conveyance of it from the drawer. B goes into possession. Afterwards, the lot aforesaid, under the Act of 1843, reverts to the State, and B gets a grant to it from the State, by paying Twenty-five Dollars, which is less than the value of the lot. B then sues A for a breach of the condition in his bond: *Held*, that B is entitled to recover of A only what B paid the State, for the grant and interest thereon.

In Equity, in Polk Superior Court. Tried before Judge TRIPPE, March Term, 1855.

The facts in this case were, that Kerley had given a bond for titles assigned to Richardson, dated October 9th, 1838, to make good titles to a tract of land embracing many contiguous lots; the titles to be made by December 25th, 1839, or on the payment of the last instalment of the purchase money.

Richardson was put into possession of all the land in 1838 or 1839, and has so continued.

Titles had been made to all the lots except one, No. 796, 2d district, 4th section, to which Kerley had a conveyance from the drawer, but which had never been granted. This lot had reverted to the State, in consequence of the grant not being applied for in time, and had been granted to Richardson under

Kerley vs. Richardson.

the Act of 21st December, 1843, at a fee of twenty-five dollars.

Kerley had brought an action on the note given for the land, and this bill was filed to enjoin that action, and claiming that the note should be credited by the value of the reverted lot. The question was, as to the amount for which the note should be credited—whether the value of the lot or the cost of obtaining the grant. Evidence was introduced of the value of the lot, both in 1838 and at this time, which latter testimony was objected to but admitted by the Court; which is alleged as error.

The Counsel for defendant requested the Court to charge the Jury as follows:

1st. That if they should believe, from the evidence, that complainant, Richardson, was in possession of the lot of land in dispute, under a purchase from the defendant, Kerley, the defendant, in good faith, holding a regular conveyance from the drawer of the lot of land, the possession of Richardson was the possession of Kerley, the defendant; and that possession was an incumbrance upon the grant; and that if Richardson, without ever being disturbed in his possession, so obtained from and held under Kerley, granted the lot of land from the State, it was, by him, an extinguishment of that incumbrance, for which he, Richardson, is entitled to be refunded the amount he so paid for its extinguishment, with interest thereon, and no more.

2d. That if the Jury should believe, from the evidence, that Richardson purchased the lot of land in dispute from Kerley, the defendant, and went into the possession of the lot of land under that purchase, and without ever being disturbed in that possession, granted the lot of land from the State, in his own name, and never having been disturbed in the possession, he, Richardson, is entitled to be re-imburshed the amount it cost him to grant the lot of land, and no more, if there was a tender of such amount made to Richardson; and if there was no tender made, then the amount paid by Richardson for the grant fee from the State, and other expenses he may have in-

Kerley *vs.* Richardson.

curred in granting the lot, with interest thereon, from the time the lot was so granted by Richardson.

3d. That if the Jury, from the evidence, should believe that Richardson, by purchasing and obtaining the possession of the lot of land from Kerley, was placed in a condition by which he was better enabled to purchase in an incumbrance or outstanding title, that he, Richardson, could not come into a Court of Equity and appropriate that advantage, thus obtained, to his entire benefit, to the exclusion of Kerley, the defendant, but that Kerley is entitled to participate in that benefit or advantage; and hence, Richardson is entitled to recover no more than the expenses he incurred, with interest thereon, in purchasing in that incumbrance or outstanding title, and thereby perfecting his title.

4th. That if the Jury should believe, from the evidence, that the plaintiff purchased, in 1838, eight lots of land from the defendant, forming a settlement of land, at Five Hundred Dollars each, and the title to all the lots was good and without dispute, except one, and it cost plaintiff twenty-five dollars to make good the title and purchase to that lot in 1845, he, plaintiff, having remained in possession from the purchase up to the present time, then plaintiff can only recover the twenty-five dollars, with the legal interest thereon.

5th. That Richardson being in possession under Kerley and owing Kerley a large portion of the purchase money, whilst he so retained that possession he was in the nature of a trustee for Kerley; and if he purchased in an incumbrance or an outstanding title, it inured to the benefit of Kerley's title, and Richardson is entitled to recover only the amount he paid for removing such incumbrance or purchasing in such outstanding title, with the legal interest thereon.

The Court refused so to charge, but on the contrary, charged the Jury as follows:

"That the complainant was entitled to be remunerated or have credited on his note the value of the lot of land at the time the title should have been made by defendant to complain-

Kerley *vs.* Richardson.

ant; and that in estimating that value, they might take into consideration the relative value of the lot of land to the settlement of land sold by defendant to complainant, but that his, complainant's, measure of damages was confined to the value of the lot of land on the 25th of December, 1839, to the settlement of land; as, by the bond, defendant was, at that time, to make titles to the land, or when the last of the purchase money should be paid; and as the failure, by complainant, to pay the purchase money at that time only prevented or postponed the making of the title, the complainant could not claim anything more by his own act or neglect than its value at that time." The Court farther charged the Jury, "that if they should believe, from the evidence, that the value of the lot of land, at the time the title should have been made, was equal to the amount of the note sued on at Law, then, by their verdict, they should decree a perpetual injunction against the note sued on at Law; and if the value so estimated as aforesaid should be less than the amount of the note, then they should decree, that upon complainant's paying the difference between the value of the lot of land and the note, that the Common Law action be perpetually enjoined as to the balance."

To which charge and refusal to charge, Counsel for defendant excepted.

ALEXANDER, for plaintiff in error.

ALEXANDER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The only question in this case is, what was the measure of damages which Kerley was liable to pay for failing to comply with the condition in his bond, that he would "make or cause to be made" to Harper or his order, good "titles" to lot of land No. 796, in the 2d district and fourth section?

The Court below held that measure to be, the value of the land at the time when the title should have been made.

Kerley vs. Richardson.

If the outstanding right or interest in the State of Georgia, which constituted the breach of this condition in the bond, was an *incumbrance*, then there seems to be no dispute between the parties, that the measure of the damages to be paid by Kerley, was what it cost Richardson, the assignee of the bond, to remove the incumbrance. At any rate, that is what the law, it seems, has, in such case, made the measure. (*Martin vs. Atkinson*, 7 Ga. R. 237. *Sedge. Meas. Dam.* 185.)

Was the outstanding right or interest in the State, then, an *incumbrance*? *Greenleaf*, in his work on Evidence, impliedly says, that an *incumbrance* is anything which shows that "a third person has a right to or an interest in the land granted, to the diminution of the value of the land granted, though consistent with the passing of the *fee* by the deed of conveyance." "Therefore," he says, "a public highway over the land; a claim of dower; a private right of way; a lien by judgment, or by mortgage made by the grantor to the grantee, or any mortgagee, unless it be one which the covenantee is bound to pay; or any other outstanding elder and better title, is an *incumbrance*, the existence of which is a breach of this covenant." (2 *Green. Ev.* §242.)

In these positions, he is supported by many cases which he cites, but they are all American cases.

There is, however, English authority for some of the positions, if not for all; at least, there is for the position, that an outstanding elder and better title is an *incumbrance*. A case is stated in *Viner's Abridgement*, in which an estate for life was held to be an *incumbrance*. (14 *Vin. Abr. Incumbrances*, (A.)

So the common form of the covenant against *incumbrances* is, that the land shall be enjoyed "free and clear" "of, from and against all and all manner of former and other gifts, grants, feoffments, leases, mortgages, bargains, sales," &c. (*Platt. on Cov.* 830.)

Under these authorities, it may be safely said, that an outstanding elder and better title, is an *incumbrance*.

If this be so then, as the right or interest of the State in the

Kerley vs. Richardson.

land was an outstanding elder and better title than that of Kerley, that right or interest was an incumbrance on the land.

It follows, that when Richardson extinguished that incumbrance by paying to the State a certain sum of money, he became entitled to recover of Kerley for the breach of the condition in Kerley's bond, produced by the existence of that incumbrance, a sum equal to that so paid to the State, together with interest on that sum.

But whether we regard the right or interest of the State in the land, as an incumbrance or as an outstanding elder and better title, which was not an incumbrance, this sum is all that Richardson was entitled to recover of Kerley.

In *Smith vs. Compton*, (30 Barn. and Adolph. 189, 407,) the breach was of a covenant that the vendor "had in himself good right, &c. to appoint and to grant, bargain and sell, &c. the premises;" and the breach consisted in another person's "being lawfully entitled to the premises"—a suit by that person and a "compromise" of the suit on the payment to the plaintiff by the purchaser of a certain sum of money. And all that the purchaser recovered, was that amount of money and his costs. He did not even contend for more.

In harmony with this case are cases in some of the States of this Union. (*Sedgewick Meas. Dam.* 181, 182, 188, 184. *4 Kent's Com.* 477.) And no cases, as far as I know, opposed to it.

It is true, as a general rule, that for the breach of warranty or the breach of any of the covenants for title, which, in modern times, have, in England, come to take the place of warranty, the measure of damages may be stated to be the purchase money and interest.. And this rule is founded upon the reason, that the purchase money and interest may, in general, be taken to be a compensation for the loss occasioned by the breach—the purchase money and interest being a fair measure of the value of the land purchased, at the time of the purchase, which land is what, in the greater number of cases, is lost by the breach. But the land, or the value of the land, is not that which is lost in *all* cases. In some cases, the breach

Kerley vs. Richardson.

extends to only a part of the land sold—in some, it extends to only a part of the interest in the whole land sold, as when the outstanding better title is by a lease for years—in some, it consists in the existence of an incumbrance which the purchaser can and does remove before actual eviction, for a less sum than the value of the land. In all these cases, what the purchaser loses by a breach of the covenant, is less than the value of the land. And so the reason of the general rule, that the purchase money and interest is the measure of damages, requires that in these cases something less than that purchase money and interest should be the measure of the damages—the reason of that rule requires that whatever shall be a compensation for the actual loss sustained in these cases, shall be the amount of the damages to be recovered in them.

The decision of this Court in *Martin vs. Atkinson*, (*supra*) is not considered to be in conflict with this view. In that case, the purchaser lost the whole land. It is true, he afterwards bought it back again, and for a less sum than the price of his first purchase. In the present case, it is only by hard construction and intendment that the purchaser can be said to have lost land of which he was never out of the possession. In the former case, there is no way of telling how much the purchaser lost by being for a time out of possession—how much the land might have been lessened in value by what occurred while he was out of possession.

In the opinion, therefore, of this Court, the charge of the Court should have been, that Richardson, the complainant, was entitled to have a credit entered on his note, for the amount which it cost him, Richardson, to get the grant from the State, besides interest on that amount, commencing at the time it was paid, and for no more.

A new trial, therefore, becomes necessary.

Swift *vs.* Crow.

No. 103.—J. SEDGEWICK SWIFT, plaintiff in error, *vs.* THOMAS CROW, defendant.

[1.] T C executed a bond by which, in consideration that S would yield up to him a certain mortgage, given to secure payment of a promissory note due by T C to S, he bound himself to pay the sum of One Hundred Dollars to S, upon condition that he should fail to give to S acceptable security on this note within ten days, and should also fail, before the first of May then next, in giving to S a mortgage on real estate as further security, and pay the recording fee for the same. Upon action brought for a breach of said bond: *Held*, that the sum stipulated was in the nature of a penalty, and not of liquidated damages.

Debt, in Whitfield Superior Court. Tried before Judge TRIPPE, April Term, 1855.

This was an action of debt for breach of the covenants of the following bond:

“GEORGIA, UNION COUNTY:

J. Sedgewick Swift having, at my request, yielded up a mortgage given him to secure a note made to him by myself and James Crow, for Two Hundred and Thirty-five Dollars—now in consideration of said accommodation, and the trouble caused to him, I bind myself, my heirs, executors and administrators, that I will pay the said Swift, his heirs and assigns, One Hundred Dollars.”

“The condition of this bond is, whereas, I promise, first, to give acceptable security on the note aforesaid, within ten days; and secondly, before next May to give said Swift a mortgage deed of sufficient real property in Murray County, and pay the fee for recording the same, all without trouble or expense on the part of said Swift; said deed for securing payment of said

Swift *vs.* Crow.

note. If I shall do all the above this bond will be void, else remain in full force.

Signed and sealed, Nov. 29th, 1847.

THO'S ^{his} CROW, [SEAL.]
mark.

Test, M. B. Owenby,
Wm. G. McCarson."

The declaration charged that Crow had not given the security or the mortgage, as stipulated.

On the trial, the bond was introduced, and it was admitted that the note referred to had been sued on, and judgment obtained at that term against James and Thomas Crow, for the whole of the principal and interest. Here the plaintiff closed his case.

Whereupon, defendant moved to dismiss the cause, on the ground that the proof did not make out the case—which the Court sustained, and dismissed the case; and this decision is alleged as error.

SWIFT; MUNNER, for plaintiff in error.

WALKER, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

Whether or not the amount that a party to a bond like that before us agrees to pay upon condition, is in the nature of stipulated damages or of a penalty, is frequently a matter of no little difficulty to determine. One thing in this connection seems clearly settled, viz: that the policy of the Courts, is, if possible, to view such sum as in the nature of a penalty. (*Ch. on Con.* 862, and see cases there cited.)

Notwithstanding this, if the agreement provide that a certain sum shall be paid in the event of performance or non-performance of a particular specified act, in regard to which dam-

Swift *vs.* Crow.

ages may arise in case of default, and there be no words evincing an intention that the sum reserved in case of a breach shall be viewed only as a penalty, such sum may be recovered as liquidated damages. (*Leighton vs. Wales*, 3 *Mee&f W.* 545. *Ch. on Con.* 866.)

But where the covenant is to perform several things or pay the sum specified, and the claim may extend to the breach of any stipulation, in such case, it seems to be well settled, that the sum specified should be considered in the nature of a penalty. (*Astley vs. Weldon*, 2 *Bos. & P.* 345. *Kemble vs. Farren*, 6 *Bing.* 141. *Davies vs. Panton*, 6 *B. & C.* 210. *Ch. on Con.* 863, 864. *Sedg. on Dam.* 406, 407, 408.)

Now the agreement in this case was first to give acceptable security on the note in ten days; secondly, before the first day of May then next, to give a mortgage on real property as additional security; thirdly, to pay the fee for recording the same. Here, then, are two or three stipulations, a failure in either of which would appear to be a breach of the bond. And yet, if that failure were only to pay the recording fee, would it not be most unreasonable that the sum of One Hundred Dollars should be paid as damages?

In consideration of this, and forasmuch as policy favors the view which regards the sum thus stipulated to be paid as a penalty, rather than as settled or liquidated damages, we feel it our duty to hold, that the plaintiff is entitled to recover on this bond only such damages as he may be proven to have suffered by breach of the same.

Judgment affirmed.

The State, &c. vs. Woody, &c.

No. 104.—THE STATE *ex rel.* JOHN B. FAIN and RICHARD WILSON, plaintiffs in error, vs. WILLIS WOODY *et al.* Justices, &c. defendants.

[1.] Where commissioners are appointed by an Act of the Legislature, for the purpose of selecting and laying off a county site, and a discretion is confided to them, in their judgment, to select a point nearest to the centre of the county, having due regard to eligibility, &c.: *Held*, that if they proceed, in good faith, to select such site, no Court has a right to control the exercise of their judgment, unless they invade private rights.

Application for prohibition, in Fannin Superior Court. Decision by Judge IRWIN.

The Legislature of 1853 laid off and created a new county, by the name of Fannin, with certain boundaries. The Act provided that the Justices of the Inferior Court for said new county, when elected, should select a site for the county seat, "at or as near the centre as practicable."

The defendants, being elected Justices, chose a site, and were proceeding to lay off a town and erect public buildings.

The plaintiffs, thereupon, made application to the Judge of the Superior Court for a writ of prohibition and mandamus, setting forth that the place selected was six miles from the centre of the county, and that situations better for the purpose could be had nearer the centre; that the site chosen was a bad one, and inconvenient to the people, and that a large majority of the inhabitants were opposed to it; that two of the Justices had opposed the selection; and other reasons, showing the impropriety of the choice made by the majority of the Justices.

The Judge refused the application, holding that the case made was not one in which he could interfere by prohibition or mandamus, the Justices having acted within their jurisdiction.

To which decision the applicants except, and assign the same as error.

The State, &c. vs. Woody, &c.

FRANCIS, for plaintiff in error.

UNDERWOOD; COBB & HULL, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] For the purposes of this judgment, we waive all discussion as to the appropriateness of the remedy selected, and put our opinion upon the merits of the case.

The question involved here, is to be determined by the character and extent of the discretion by the Legislature confided to the Justices of the Inferior Court of Fannin County, as commissioners, for the purpose of selecting a site therein for the public buildings and seat of justice.

In the case of *Hamrick et al. vs. The Commissioners of Lee County*, decided at the last term of this Court at Columbus, it was insisted that certain commissioners appointed by the Legislature for the purpose of selecting an eligible site for a new county site in said county, should be enjoined, because the said commissioners had not selected an eligible site nor one near the centre of the county; and we there held, that these commissioners, for the purpose of executing the duty which they were appointed to perform, were clothed with a portion of the sovereign power and discretion; and that the exercise of that discretion, in good faith, so far as it depended upon matter of judgment, no Court had a right to control, unless they violated private rights.

That view of the subject is applicable to this case. The Legislature gave to these Justices, not as a Court, but as commissioners, a discretion to be exercised according to the dictates of their judgment. The Act provides, that they "shall have full power and authority to select and locate a site for the public buildings of said county. The said site to be located as near the said centre as practicable; and the said Justices, or a majority of them, are hereby invested with full power to purchase a tract of land, or so much thereof as may be necessary;

The State, &c. vs. Woody, &c.

for the location of the county site, to divide the same into lots and sell each lot at public sale for the benefit of the county, or to make such other arrangements or contracts concerning the county site, or location of the public buildings, as they, in their judgment, may think proper."

The discretion thus entrusted to these commissioners, is very general indeed.

It is true that they are required to fix the county site as near the centre of the county as practicable. And the terms thus used are not the most appropriate for the expression of the idea, that the site thus selected was to be as near the centre of the county, as eligibility of situation, conditions of purchase, &c. might allow. But the reason of the thing, and the whole of the section taken together clearly show that this was the intention, that it was never designed by the Legislature that the commissioners were to select such point and none other, as was, by geometrical and mathematical calculation, the centre of the county, though the same might be in the midst of a deep swamp (if swamp there be in Fannin County) or on the highest and most precipitous rock of Frog Mountain. It follows, that these commissioners were provided with authority which empowered them to fix the county site at some point which, *in their judgment*, with due regard to eligibility, &c. was the nearest point to the centre of the county.

Of course, it was expected by the Legislature, that that judgment would be intelligently and faithfully exercised. But if they have proceeded, or are proceeding in good faith to exercise it, as we have said in the case above cited, no Court has authority to control them, unless they invade private rights.

At first, we supposed that there were some allegations in the petition which charged them with a wilful departure from the requirements of the Act—with exceeding their authority or refusing to exercise it in good faith. But upon examining the writ more closely, we perceive that there is nothing in it which negatives the idea, that they have not selected the site nearest the centre of the county, having regard to eligibility, terms of purchase, &c.

Selman & Co. vs. Shackelford.

The petition asserts, that previous to any action being taken by the commissioners, "it was determined and agreed, by and between a majority of the members of said Court, that they would not locate the said town at the supposed centre of said county, but it was resolved by them to violate the law in its location, for the sole benefit and accommodation of a few leading men of said county," &c. It goes on to allege, that they proceeded to fix the site at a point which they "admitted was not the centre of said county, but distant therefrom some five or six miles south," &c.

Strong as this charge is, as to the *motives* of the commissioners, still, it does not negative the proposition, that the point selected is with reference to the centre of the county, the nearest eligible point; for it is possible that the interests of the "few leading men" to which reference is made, may have been consulted as the prime motive; and yet, the site selected have been the nearest to the centre, which was eligible and proper for the purpose.

We are therefore, of the opinion, that nothing is shown which can authorize an interference with the discretion confided to these commissioners.

Let the judgment be affirmed.

No. 105.—JAMES SELMAN & Co. plaintiffs in error, *vs.* S. M. SHACKELFORD, claimant, defendant.

- [1.] In all cases of claim, whether under attachment or execution, the bond should be made payable to the plaintiff.
- [2.] In a claim affidavit, the form of the oath is sufficient, provided it asserts the right to the property to be in deponent.
- [3.] To a plea of misnomer, it is a sufficient reply, that the party is as well known by one name as the other.

Selman & Co. vs. Shackelford.

[4.] A mistake in the christian name of a person, recited in an immaterial part of an affidavit, will not vitiate the proceeding.

[5.] The parties to a *certiorari* are entitled to be heard in the Superior Court, personally or by Attorney, as in all other cases; unless the constitutional privilege is waived.

Certiorari, in Gordon Superior Court. Decision by Judge JOHN H. LUMPKIN.

This was an attachment sued out in a Justice's Court, at the instance of Jas. Selman & Co. against one Humphrey P. Hudgins. The property levied on was claimed by S. M. Shackelford, by the following affidavit:

"STATE OF GEORGIA—GORDON COUNTY:

In attachment before Justice's Court. And now comes S. M. Shackelford and avers, that one half of the tobacco levied on in the above case is his, the said Shackelford's individual property, and not the property of Posey Hudgins: and this he is ready to verify, and prays that the same may be inquired of by a Jury.

S. M. Shackelford appeared before me, G. W. Ransone, Justice of the Peace in and for said county, and makes oath and says, that the above plea is true in substance and fact.

Sworn to and subscribed," &c.

A claim bond was filed, payable to the plaintiffs in attachment.

On the trial the plaintiffs moved to dismiss the claim, on the ground that the claim bond was not made payable to the levying officer; and also, that no sufficient affidavit was filed; and also, that in the claimant's plea the property was stated not to be the property of Posey Hudgins, while the name of the defendant was Humphrey P. Hudgins. These objections were all over-ruled, and the Justice's Court gave judgment for the claimant.

Plaintiffs thereupon applied for a *certiorari*, on the ground of error in the Justices, on said points.

Selman & Co. vs. Shackelford.

The answer of the Justices stated the fact, that the defendant was as much known by the name of Posey Hudgins as of Humphrey P. Hudgins. The Court, on hearing the *certiorari*, sustained the grounds taken and ordered a new trial ; to which the claimant excepts.

Claimant's Counsel also excepts, on the ground, that he had no notice of the *certiorari*; and on applying to be heard, after the decision of the Court had been pronounced, on the ground that he had not been notified. Such application was refused by the Court, and this is assigned as error.

FRANCIS, for plaintiff in error.

PHILLIPS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In cases of claim under the Attachment Law, to whom should the bond be made payable, the levying officer or the creditor ?

By the Act of 1814, (*Cobb's Digest*, 72,) the bond is required to be given to the "Sheriff or Constable serving the attachment." And this is the Statute relied on in the argument in behalf of the defendant in error, and which was read, no doubt, in the Court below. Under this Act, it was by no means clear *to whom* the bond should be made payable. But in 1841, the Legislature enacted, "that *in all cases*, whether the levy be made under attachment or execution, the bond should be made payable to the plaintiff in attachment or execution." (*Cobb's Digest*, 586.)

The bond, therefore, was taken in pursuance of the law.

[2.] Was the affidavit sufficient ? Shackelford deposed that one half of the property levied on belonged to him individually, and was not the property of the defendant. The law requires, that the claimant shall make oath that the property levied on is his. (*Cobb's Dig.* 647.)

McAllister *vs.* The State.

We see no defect in the affidavit.

[3.] Again, it was objected, that in the affidavit it was alleged that the property levied on did not belong to Posey Hudgins, when the name of the debtor and defendant was *Humphrey P. Hudgins*.

The Magistrate states, in his return, that Hudgins was as well known by the one name as the other. And that was a satisfactory reply to the supposed misnomer.

[4.] But there is another answer. By reference to the claimant's oath, to which we have just alluded for another purpose, it will be perceived that it is only necessary for the claimant to assert property in himself; and it is not required that he should go further and negative the right of the defendant. And consequently, a mistake as to the christian name of the defendant, would not vitiate the proceeding.

We affirm the judgment of the primary Court upon all the grounds taken in the *certiorari*.

[5.] That the parties to a *certiorari* are entitled to be heard in the Superior Court, personally or by Attorney, as in all other cases, provided they claim the privilege, is a proposition too plain to need argument.

No. 106.—JOHN G. McALLISTER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] Several persons are indicted for a riot. All except one continue their case. He demands a trial. The Court refuses a trial. He then insists that his demand shall, under the Code, be put upon the minutes: *1st.* That by law, he could not be tried then. *2d.* That by law, he could not demand to be tried then.

Indictment for riot, in Cass Superior Court. Tried before Judge IRWIN, March Term, 1855.

McAllister *vs.* The State.

The plaintiff in error was indicted, together with seven others, for a riot.

At March Term, 1855, all the other defendants having continued their case, McAllister announced himself ready for trial. The Court refusing to try him separately, he moved to place on the minutes a demand for trial. This also the Court refused; and on these decisions error is assigned.

UNDERWOOD, for plaintiff in error.

MILNER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Section fifty of the fourteenth division of the Penal Code is as follows: "When two or more defendants shall be jointly indicted for the same offence, any one defendant may be tried separately, except such offences as require the action and concurrence of two or more to constitute the crime; and in such cases the defendants shall be tried jointly." (*Cobb's Dig.* 841.)

In 1836, this section was amended so as to make "it lawful for the Superior Courts to try two or more" of the persons charged with such offences as those of the latter sort. (*Ibid.*, *Ibid.*)

[1.] The offence charged in this case being a riot, an offence, to constitute which, the concurrent action of two or more persons is necessary, the Court could not, without disregarding these provisions of the law, try one of the accused by himself. This is plain. The Court was right, therefore, in refusing to try McAllister.

Nor was the Court wrong in refusing to let his demand be entered on the minutes. It is true that section eighteen of division fourteen of the Penal Code is as follows: "Any person against whom a true bill of indictment is found for an offence not affecting his or her life, may demand a trial at the term when the indictment is found, or at the next succeeding term."

Tucker and another *vs.* Shorter *et al.*

thereafter, which demand shall be placed upon the minutes of the Court; and if such person shall not be tried at the term when the demand is made, or at the next succeeding term thereafter, *provided*, there were Juries impanelled and qualified to try such prisoner, then he or she shall be absolutely discharged of the offence charged in the indictment." But this section is to be construed with the two sections already mentioned, and the construction is to be such that all of the sections may, if possible, stand.

Now the only construction which will effect this, is one which brings out the following result: any person indicted by himself or with others, &c. may, by himself, demand a trial at the term at which the indictment shall have been found, &c. *provided the offence with which he stands indicted, is one which admits of his being tried by himself, and not otherwise, &c. &c.* For when the two later sections say, as they do, in effect, that in such cases it shall not be lawful to try one defendant by himself, they say that it shall not be lawful for one defendant to demand to be tried by himself.

So we think the Court below was again right, in refusing to allow the demand to be entered on the minutes.

No. 107.—JAMES T. TUCKER and another, plaintiffs in error,
vs. ALFRED SHORTER, *et al.* defendants.

[1.] Public officers or agents contracting for the State, are not individually liable for obligations assumed in that character.

Covenant, in Floyd Superior Court. Decision by Judge TRIPPE.

The declaration in this case alleged, that in 1851, the Legislature passed an Act appropriating the sum of Five Thousand

Tucker and another *vs.* Shorter *et al.*

Dollars for the improvement of the Coosa river, and appointed the defendants commissioners for its disbursement, the same to be appropriated by them when they should receive a like sum, by voluntary subscription, from private citizens. The defendants accordingly entered into a certain contract with the plaintiffs to do certain work upon the river for the improvement of the navigation, minutely stipulating the kind and quantity of work to be done, for which they covenanted to pay the plaintiff Thirty-five Hundred Dollars. The defendants designated themselves in such contract as commissioners.

The declaration charged, that plaintiffs had performed their contract, but that defendants had failed to pay the sum agreed on. The action was brought against the defendants individually, as joint obligors; but it was alleged that they contracted as commissioners, &c.

The defendants demurred to this declaration, on the ground that no action at Law could be maintained under such a state of facts; and the Court sustained the demurrer and dismissed the case.

And this decision is assigned as error.

WRIGHT & SHROPSHIRE, for plaintiff in error.

UNDERWOOD, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] It is conceded by the Counsel for the plaintiff in error, that if this contract were made with the defendants in error, as agents of the State, the latter are not personally liable. But it is insisted that they did not contract in this character, though holding themselves forth in the contract as commissioners for the improvement of the navigation of the Coosa river, by the Legislature appointed, because they represented also a fund raised by voluntary subscription of private citizens, and entrusted to them for the purpose of being applied to the improvement of the navigation of Coosa river. And as to this,

Shropshire & Hawkins vs. Stevenson.

fund it is urged, they had the right to bind themselves personally.

All this may be true; but it is not properly set forth in this petition. It is there alleged, that "as commissioners," &c. they contracted and covenanted, &c. This was their character as public agents, and they are not, by the declaration, charged as being liable, because having in possession a private fund, for the appropriation of which they are responsible. If the case had been so framed, and it had been alleged, that in consideration of this they had bound themselves personally, and the charge were sustained by proof, then a recovery against them individually, perhaps, might be put upon this ground. But the declaration does not show this, and the Court below was right in dismissing it.

No. 108.—SHROPSHIRE & HAWKINS, plaintiffs in error, vs.
JAMES A. STEVENSON, defendant.

[1.] The caption of a set of interrogatories, is in the hand-writing of a party, and the answers to the interrogatories are in the hand-writing of the witness: *Held*, that that party may, nevertheless, read the interrogatories as evidence.

Assumpsit, in Floyd Superior Court. Tried before Judge TRIPPE, November Term, 1854.

This was an action for damage done to goods of the plaintiffs, while in defendant's possession, who was hauling them from Rome to Summerville.

The goods were injured by being wet, from defendant's wagon getting stalled in Chattooga River. It was proved that defendant, on two other occasions, had done hauling for different persons; and it was contended that he was a common car-

Shropshire & Hawkins *vs.* Stevenson.

rier. There was also evidence going to show that Shropshire, one of the plaintiffs, had, on this occasion, agreed to show the driver the way across the river.

The Court charged the Jury, that if the defendant was a common carrier, he was liable for the goods at all events, save the act of God or the public enemy ; that if not a common carrier he was bound, on his contract, for ordinary diligence ; that if plaintiff agreed to take the responsibility of getting the wagon through the river, defendant was relieved from that portion of his liability.

The Court also charged, that the law implied a consideration for service rendered, but that if they were rendered gratuitously, still, the defendant would be liable for gross negligence.

To this latter portion of the charge plaintiffs except, on the ground that there was no evidence to show that the services were rendered gratuitously.

Another exception is, that during the trial, the interrogatories of H. D. C. Edmonson and G. P. Burnett, being offered by plaintiffs and objected to, were ruled out by the Court, on the ground that the caption to the answers was in the hand-writing of one of the plaintiffs, and the answers, themselves, were in the hand-writing of one of the witnesses.

And on these rulings of the Court, the plaintiffs allege error.

WRIGHT & SHROPSHIRE, for plaintiffs in error.

ALEXANDER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] It is not to be presumed, in the absence of proof, that any man is a law breaker. It is therefore not to be presumed, in the absence of proof, that one of the plaintiffs in this case was present when the commission to examine Edmonson and Burnett was executed.

It was however argued for the defendant in error, that there

Dobbs and another *vs.* The Justices, &c.

was evidence to show one of the plaintiffs to have been present, and so, to rebut this presumption. That evidence, as it was contended, consisted in the fact that the caption of the interrogatories was in the hand-writing of one of the plaintiffs. But, as we think, this fact makes at least as much for as against the presumption. If one of the plaintiffs wrote the caption when present at the execution of the commission, why did he stop at the caption and not go on and write the answers too?

We know not of any law which requires the commissioners to write down the answers of the witness with their own hand. If they may use the hand of another person, why may not that hand be the hand of the witness himself? If the hand used be the witness' own, we can be sure of one thing, and that is, that what we get is the very language of the witness himself.

We think, therefore, that the interrogatories and answers of *Edmonson* should have been admitted to the Jury; and so, we have to order a new trial.

The presence of the witness, Burnett, at the trial, was reason enough for excluding from the Jury his examination under the commission.

As to the other point, we merely say, that even if, as to it, the Court below erred, the error was one which could operate only in favor of the plaintiffs in error. We are far, however, from intimating that we think the Court did err as to that point.

No. 109.—REUBEN T. DOBBS and another, plaintiffs in error,
vs. THE JUSTICES OF THE INFERIOR COURT OF MURRAY
COUNTY, defendants.

[1.] Process appearing to be regular upon its face, the official attestation of the proceedings is *prima facie* evidence of the genuineness of its execution.

Dobbs and another vs. The Justices, &c.

- [2.] The law requires that a bond be taken before suing out an attachment; but it does not make it necessary for the Magistrate to attest it; and it is not sufficient if it be found with the other papers in the proceeding—the attachment stating upon its face that the bond was given in terms of the law.
- [3.] Where both of the joint-debtors reside out of the State, the affidavit of the attaching creditor need not recite that the indebtedness is upon a joint contract.
- [4.] Original papers, if to be procured, are always better evidence than copies; and the latter are allowed only from necessity or convenience.
- [5.] If the admissions of the *principal* are made during the transaction of the business for which the surety is bound, they become a part of the *res gestae*, and are admissible; otherwise, they are not.
- [6.] An officer who is sued for not selling property levied on by attachment, may prove, in his defense, paramount title in another.
- [7.] The Act of 1819 prescribes \$400 as the amount of a Constable's Bond in the counties, and \$1000 in a town or city; in a suit upon the latter; Held, that it is not incumbent upon the plaintiff to aver and prove that it was taken in a town or city.
- [8.] The rule in criminal cases, that whereas an offence is created by Statute, and there is an exception in the enacting clause, that it is for the indictment to charge and the proof to show, that the defendant does not come within the exception, is not applicable to civil proceedings.
- [9.] The averment of neglect of official duty, though negative, ought to be supported by *some proof* on the part of the plaintiff.
- [10.] Generally, in actions against defaulting officers, the measure of damages is the injury sustained.
- [11.] Plaintiff's debt is, *prima facie*, the measure of his damages.
- [12.] If the wrong be wilful on the part of the officer, the Jury may give more than the amount of the debt, by adding to it the cost and incidental expenses incurred. It is competent, however, for the officer to prove in mitigation, any facts which show that the plaintiff has suffered nothing or but little by his *unintentional* fault.
- [13.] If the wrong done be not wilful or fraudulent, and the plaintiff is not placed in a worse situation than he otherwise would have been, had the officer discharged his duty, the Jury will be at liberty, and it will be their duty to see, that a mistaken officer is not made to pay greater damages than the plaintiff has suffered.
- [14.] In the latter class of cases, that is, where the delinquency is unintentional, the officer may show, in mitigation of damages, that the debtor was insolvent; or that for any other reason, the plaintiff has not been damaged.

Dobbs and another vs. The Justices, &c.

Debt, in Murray Superior Court. Tried before Judge TRIPPE, April Term, 1855.

This was an action brought by the Justices of the Inferior Court, for the use of James Forsyth against William Weems, principal, and Reuben T. Dobbs and John Devers, sureties, on a Constable's bond, to recover damages for not returning an attachment, levied by Weems, as Constable, at suit of Forsyth, on a wagon and horses, as the property of one Enos H. White.

A return of "*non est inventus*" was made as to Weems.

On the trial, the plaintiff produced an attachment against White, with an entry of levy signed by Weems.

It was objected to, on the ground that there was no proof of its execution; and also, that the attachment bond was not attested. Both objections were over-ruled, and defendants excepted.

Plaintiffs then offered in evidence, as the foundation of the attachment, a note of Enos H. & A. R. White, for \$322, credited by some thirty dollars, and amounting, with the interest, to more than \$1,000. Objected to, as not sustaining an attachment against Enos H. White alone. The objection was over-ruled, and defendants excepted.

Plaintiffs then offered the bond in the sum of One Thousand Dollars, signed by defendants and properly attested.

To which being admitted as evidence, Counsel for defendants objected, on the ground that the law requires such bonds to be recorded, and a copy from the record properly certified, is the best evidence in such case, and should have been procured in this case; which objection the Court over-ruled, and defendants' Counsel excepted. Plaintiff then introduced William P. Hackney, who swore that he heard a conversation between Weems, Forsyth and Augustus N. Hargroves, Esq. Attorney for said Forsyth in said attachment, relative to the levying of an attachment at the time it was levied, in favor of Forsyth against R. H. White, as he understood the conversation; he thought said conversation took place in the spring of 1846, in Dalton.

Dobbs and another *vs.* The Justices, &c.

Forsyth inquired of Weems where the property levied on by his attachment was? Weems pointed to the wagon and three horses and said the property was there. Forsyth inquired for the other horses. Weems replied, he had permitted said White to take them down to the shop to have them shod. Forsyth told Weems, White was a slippery chap and he had better watch him close. Weems said all would be right. Witness thinks the horses and wagon were worth about four or five hundred dollars. I would say the whole property levied on worth five hundred dollars.

Defendants' Counsel objected to the giving in of Weems' sayings to charge the defendants. The Court over-ruled the objections, and defendants' Counsel excepted.

Plaintiff then proved by John Forsyth, that at the time said attachment issued, both E. H. and A. R. White lived out of the State of Georgia. Plaintiff here closed his testimony.

Defendants then proposed, by way of mitigation of the damages, to prove that the legal title of the property levied on was not in the defendant in said attachment, but was in another; and that, therefore, the plaintiff had not been injured. Plaintiff's Counsel objected to this testimony, which objection was sustained by the Court, and the testimony ruled out, and defendants' Counsel excepted.

The cause being closed, the Counsel for defendants asked the Court to charge the Jury, that the bond being in the sum of One Thousand Dollars was illegal and void, unless the plaintiff had proved that it was given in a city or town, and that being an exception to the general rule, the burden of the proof was on the plaintiff, to show it was given in a city or town; and that if the Jury should find that plaintiff had not proved this fact, they must find for defendants; the Court refused so to charge, but charged the Jury, that the defendants having executed said bond, it devolved on them to show the fact, if it existed, that the bond was not taken in a city or town district, and that on their failing to do so, said bond was obligatory on them; and defendants' Counsel excepted.

Defendants' Counsel also requested the Court to charge the

Dobbs and another vs. The Justices, &c.

Jury, that as the issue in this case is, whether Weems returned the attachment or not, and as the law presumes every officer does his duty, it was necessary for plaintiff to show that Weems had failed to return said attachment according to its requirements; and that if they should find no testimony had been given in to show such failure, that they must find in favor of defendants. The Court refused so to charge; but on the contrary, charged the Jury, that as plaintiff had sued defendants, for said Weems having failed to return said attachment and having shown that Weems, the Constable, levied on the property, it was necessary for the defendants to show that said Weems had done his duty in the premises; to which charge and refusal to charge, defendants' Counsel excepted.

The Court farther charged the Jury as follows: that if they should find in favor of the plaintiff, the measure of damages would be the amount of his debt against White; but they could not go beyond the amount of the bond, one thousand dollars; and defendants' Counsel excepted.

The Jury rendered a verdict in favor of the plaintiff for the amount of the bond, one thousand dollars, with costs of suit. And Counsel for defendants tender their bill of exceptions, and say—

1st. The Court erred in admitting said attachment bond and levy.

2d. That the Court erred in admitting said sealed promissory note, made by E. H. & A. R. White.

3d. The Court erred in admitting in evidence the original bond of Weems and defendants.

4th. The Court erred in admitting the sayings of Weems, to charge defendants.

5th. The Court erred in repelling defendants' testimony, offered to prove that the title to the property levied on was not in defendant, White, and said property was subject to said attachment.

6th. The Court erred in charging the Jury, as it did, that the burden of proof was on defendants, to show that the Con-

Dobbs and another *vs.* The Justices, &c.

stable had done his duty, and that the bond was taken for too large an amount.

7th. The Court erred in refusing to charge as requested by defendants:

8th. The Court erred in charging the Jury as to the measure of damages.

WRIGHT; WALKER, for plaintiff in error.

AHIN, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first error assigned is, that the Court admitted the original attachment to go in evidence to the Jury, without requiring proof of its execution.

The official attestation of the papers, is *prima facie* proof of their genuineness, and casts the burthen upon the party denying it.

[2.] The next complaint is, that the attachment bond was not attested by the officiating Magistrate. The law does not require that it should be. Bond, says the Statute, must be taken; and the Justice who issued the attachment, recites, in the face of it, that bond and security were given in terms of the law, in such cases made and provided. Besides, the bond is attached to the other papers, and appears with them in the record of the proceeding.

[3.] It is objected, that the affidavit charges Enoch H. White as being indebted to deponent, when the note produced on the trial was the partnership note of E. H. & A. R. White.

We see no necessary repugnance between the oath and the proof. It is true, that where a declaration charges a joint indebtedness to maintain the action, it must be proved as laid.

And so, *e converso*, if the declaration charges individual indebtedness against the defendant, the evidence should correspond. (2 T. R. 478. 1 Chitty's Pl. 31. 1 East. 52.)

Where one of the joint debtors is dead, however, or a certif-

Dobbs and another *vs.* The Justices, &c.

icated bankrupt, the declaration need not notice such a party, though, perhaps, it is more formal to do so. (1 *Chitty's PL* 28, 42. 1 *Jehns. Cas.* 405. 1 *Barn. & Ald.* 29. 4 *Ibid.* 452.)

Here it appears, from the testimony, that both of the Whites resided out of the State. One of them sent property into the State, which was attached. Why not treat the other as actually or civilly dead? In other words, not notice him at all in the proceeding?

Besides, the alleged defect here is in the oath, which is never supposed to set forth the contract upon which the indebtedness is founded. That is left for the declaration, to be subsequently filed in the case.

Either this is a sound view of the subject, or else, there is a *caveat emptor* in our Law of Attachments. An attachment would never lie against one of two joint debtors, provided the ordinary process of law could be served on the other. No such defect, we apprehend, exists in the law. If it does, the sooner it is remedied the better.

[4.] The Statute allows certified copies of official bonds to be sued upon; and the argument is, that this permissive Act makes the copy better evidence than the original. Such is not our understanding, either of the meaning of the Act or the philosophy of evidence. Original papers are always better testimony than copies; and the latter are allowed to be used only from necessity and convenience.

[5.] We are next to consider the admissions of a principal as evidence in an action against his sureties. If made during the transaction of the business for which the surety was bound, so as to become part of the *res gestae*, they have been held admissible; otherwise, not. (1 *Greenl. on Ev.* 6th Ed. §§137, 138.)

The proof in this case is stronger even than the foregoing rule. It goes to the conduct rather than to the sayings of the Constable. He pointed to the property while in his custody, as that upon which he had just levied the attachment.

[6.] It is contended that the Court erred in refusing to al-

Dobbs and another vs. The Justices, &c.

for the defendants in the Court below the privilege of showing that the property levied on was not subject to the attachment.

Under the stringent rule laid down by this Court, in *Chambers, Governor, &c. vs. Word, Wofford and others*, (7 Ga. R. 445,) the Circuit Judge was right, perhaps, in repelling the proof to this point. But the doctrine in that case has been modified; and under our present view of the law, as announced during this term in *Taylor vs. The Governor, &c.* we held that an officer who is sued for not selling property levied on by attachment, may prove a paramount title in another in his defense. Under an execution or attachment against A, it would be trespass in the officer to seize the property of B.

[7.] Counsel for defendants below asked the Court to charge the Jury, that the bond being in the sum of one thousand dollars, was, *prima facie*, illegal and void, and that it was incumbent on the plaintiff to show that it was given in a city or town, and thus bring it within the exception to the general law. The Court refused to give the instruction requested; and on the contrary, held, that the *onus* was upon the defendants, to show that the obligation into which they had voluntarily entered, was not binding.

The Act of 1818 provides, that "each and every Constable shall give bond with two or more securities, to be judged of by the Justices of the Peace in their respective districts, in the sum of \$500, (unless said district be in a town—and in that case, \$1,000) for the faithful performance of the duties of their office as Constable." (*Cobb's Dig.* 206.)

Cities and towns in this State, as well as Militia Districts, are all created by law. And it is by no means certain. But that the Courts are bound to know whether a particular district for which the Constable is qualified, be or be not within a town or city. But we are clear, that the rule of criminal pleading, that where an offence is created by Statute and an exception is made, not by another Statute nor by another and substantive clause of the same Statute, but in the enacting clause, that it is for the indictment to charge and the proof to

Dobbs and another *vs.* The Justices, &c.

show, that the defendant does not come within the exception—does not apply to civil cases. The rule in civil and criminal proceedings is different, in this respect, and for manifest reasons which need not be elaborated.

The Circuit Judge was right, in our opinion, in holding that it was incumbent on the defendants to prove the negative, namely: that Weems was not a Constable in a town or city at the time of executing the bond:

[8.] It is alleged as error, that the Court charged the Jury that the *onus probandi* was upon the securities to show that their principal had done his duty.

[9.] The averment of neglect of official duty, though negative, ought, it would seem, to be supported by some proof on the part of the plaintiff, since a breach of duty is not to be presumed; but from the nature of the case, very slight evidence will be sufficient to devolve on the defendant the burden of proving that his duty has been performed. (1 *Greenl.* §78, 81. 2 *Id.* §584.)

In this case, the Jury were told, in substance, that the presumption was against, instead of being in favor of the party charged with official neglect of duty; and it does not appear, from the proof, but that the attachment papers may have been taken from the Clerk's office, the proper place for returning such process.

[10.] Lastly, the Court charged the Jury, that the measure of damages would be the amount of the debt, provided it did not exceed the penalty of the bond; in that event, the amount of the bond would be the measure of damages.

Here, again, the Judge was governed by the decision of this Court in the *Governor, &c. vs. Wood et al.* already referred to. And if there be error in this charge, and we hold there is, the fault lies at our door—my door—and our brother is blameless. The measure of damages is the injury sustained, whatever that be.

[11.] Generally, the plaintiff's debt is *prima facie* evidence of the extent of the injury which he has sustained by the off-

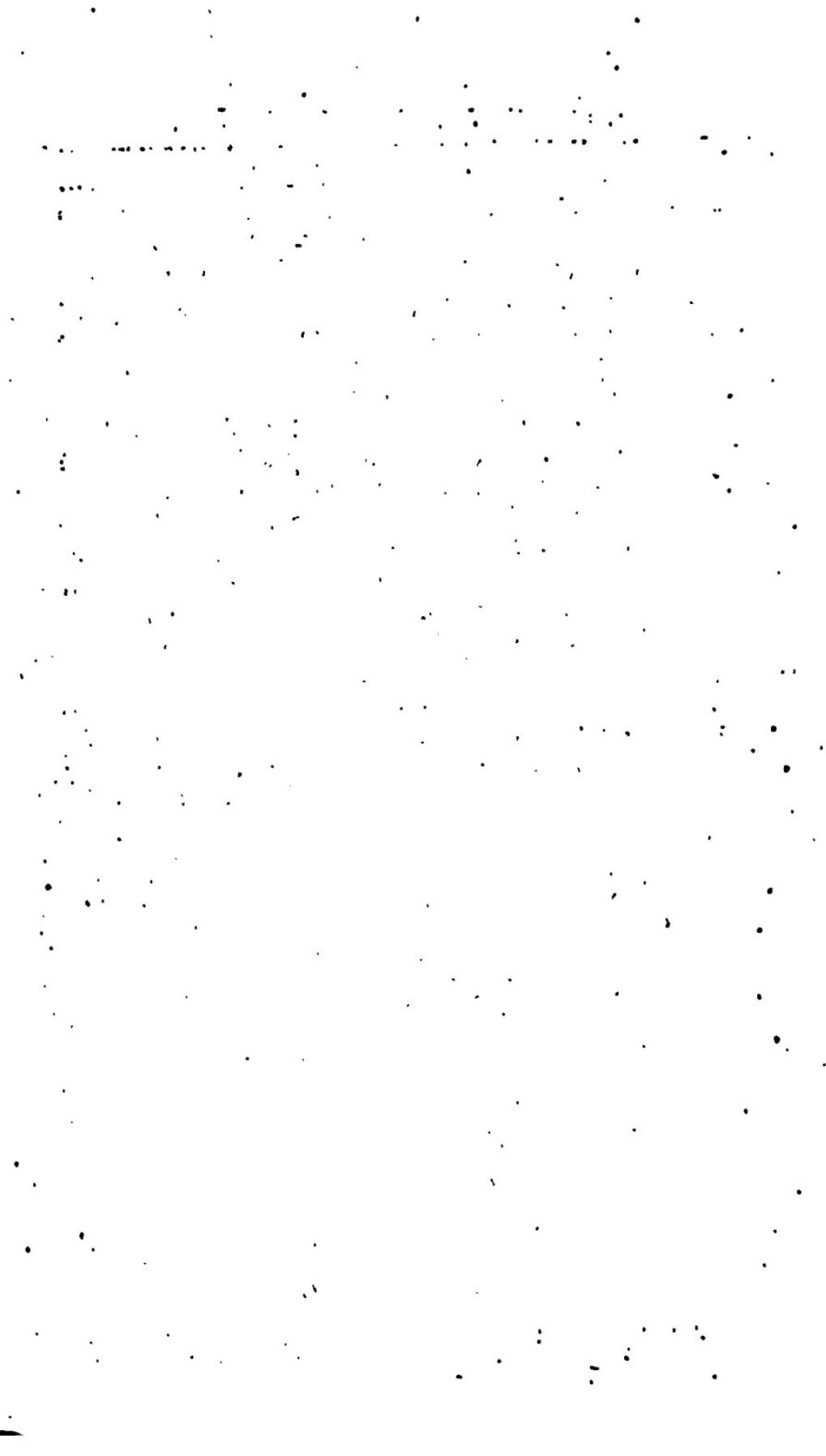
Dobbs and another *vs.* The Justices, &c.

cer's breach of duty, in regard to the service and return of the process.

[12.] And cases may occur where the Jury may give even more than the amount of the debt, if they believe the wrong was wilful on the part of the officer, by adding to it the costs and incidental expenses incurred. Yet, it is competent for the officer to prove, in mitigation of the injury, any facts which show that the plaintiff has suffered nothing or but little, by his unintentional default or breach of duty. (*2 Greenl. Eu.* §599.)

[13.] On the other hand, if it should be apparent that the wrong done by the officer was not the result of a design to injure, and that by it the plaintiff is not placed in a worse situation than he would have been in had the officer done his duty, the Jury will be at liberty, and it will be their duty to see, that a mistaken officer is not made to pay greater damages than the party has actually suffered by his wrong. (*Ibid.*)

[14.] In cases, therefore, of the latter description, the Sheriff is permitted to show, in mitigation of damages, that the debtor was poor and unable to pay the debt, or that for any other reason the plaintiff has not been damnified. (*Ib.*)



INDEX.

ABATEMENT.

1. Trover does not abate by death of defendant. *Woods vs. Howell*..... 495
2. *Sci. fa.* to make parties, may issue in any reasonable time. It is not obliged to be issued at expiration of 12 months. *Ibid.*

See Garnishment, 1. Sci. Fa.

ACTION.

1. When a day is appointed for the payment of money, or doing any other act, and the day is dependent upon the performance of some other act, no action can be maintained until such other act is first performed. *Barnes vs. Strohecker*..... 340
2. Representations which do not appear to have been heard or acted on by a party, can constitute no ground of action or defence by that party. *Janes vs. the Trustees, &c.*..... 516

See Roads, &c. 1.

ADMINISTRATORS, EXECUTORS, &c.

1. A debt due to the Central Bank is entitled to payment from an estate, upon the same footing with "debts due the public." *Mahone vs. The Central Bank*..... 111
2. Where there is neither father, mother, brother, sister, wife nor children, distribution should be made among cousins on the paternal and maternal sides equally. *Reed et al. vs. Clepton et al.*..... 230
3. The Ordinary is authorized to grant temporary letters "until permanent letters are granted." If there is an appeal from the grant of permanent letters, the temporary administrator will continue in office until the appeal is disposed of: *Gresham, Ordinary, vs. Pyron*..... 49
4. An administrator is not necessarily entitled to recover all the property of which his intestate died possessed. *Reeves, adm'r, vs. Matthews*..... 449

See *Appeal*, 2, 3. *Costs*, 1. *Equity*, 9, 10, 12. *Husband and Wife*, 1, 2. *Limitation of Actions*, 1.

ADMISSIONS

1. Of a party against his interest as to property, are good against himself and his privies, whether he is in possession or not. *Woods and another vs. McGuire's Children*..... 308
2. Verbal admissions, to be available as evidence, should not only be clearly proved, but it should also appear that they were deliberately made and clearly identified. *Printup vs. Mitchell*..... 558
3. Hasty and inadvertent expressions should have little or no binding efficacy. *Ibid.*

See *Corporations*, 4. *Estoppey*, 8. *Principal and Agent*.

INDEX.

AGENT.

See Principal and Agent.

ALIMONY.

1. It is a good plea, in bar of an application for temporary alimony, that the parties were not lawfully married; and the Court may try and decide this issue without a Jury. *Roseberry vs. Roseberry*..... 189

AMENDMENT.

1. Under the Act of 1854, an amendment is allowable at any stage of the cause; and hence, when there has been a judgment of reversal in the Supreme Court, an amendment is allowable before final action in the Court below. *Walker et al. vs. Cook*..... 123
2. Under the Act of 1854, a motion for a new trial may be amended by taking another ground, not taken when the application was made. *Snellings vs. Darrell*..... 141
3. The Constable's return on a Justice's Court warrant, may be amended after judgment. *Freeman & Benson vs. Carhart Bro's & Co*..... 808

See Appeal, 1. Practice Superior Court, 3. Verdict, 2, 3.

APPEAL.

1. A misnomer in an appeal is amendable. *Watkins, Chappell & Co. vs. Smith*..... 68
2. Appeal lies from a refusal of the Ordinary to grant let-tres pendentia. *Graham, Ordinary, vs. Pgrave*.... 263

3. If the Ordinary refuses to enter an appeal, mandamus is the proper remedy. *Ibid.*
4. It is too late to move to dismiss an appeal, when the Counsel are concluding the case to the Jury. *Kirkby vs. The Lessee of Sensborough*..... 546

See Ordinary Court, 2.

ASSIGNMENTS.

See Fraudulent Conveyances.

ATTACHMENT.

1. The bond is good, though for more than double the amount. *Shockley vs. Davis et al.*..... 175
2. It need not be attested by the officer issuing, where the attachment states its being given in terms of the law. *Dobbs and another vs. the Justices, &c.*..... 626
3. Where both of the joint debtors reside out of the State, the affidavit need not recite that the indebtedness is upon a joint contract. *Ibid.*

ATTORNEY.

1. To make him incompetent to testify as to a fact, the knowledge of the fact must have been acquired by him, both during the relationship of client and Attorney, and by reason of that relationship. *Watkins, Chappell & Co. vs. Smith*..... 63
2. His lien does not attach to a fund brought into Court by his process, but claimed and adjudged to older liens. *Waters vs. Grosvenor Bro's & Co.*..... 633

INDEX.

BAIL.

1. The *sci. fa.* against bail in an indictment, is to be issued from the Court of the county where the indictment is, and not the county of the residence of the bail. *Cooper vs. the State*..... 487

BAILMENT.

See Slaves, 1, 2.

BANKS.

1. Notice to the cashier of a bank is notice to the bank. *Lessee of Veasey vs. Graham*..... 99
2. The purchase of slaves and the employment of overseers, is not such an occupancy of land as is customary with banks. *Ibid.*

See Adm'r'a, &c. 1. *Bill of Exchange*, 2. *Deed*, 2. *Equity*, 7. *Limitation of Actions*, 8.

BILLS OF EXCHANGE.

1. Where a bill drawn by H, with the names of R & E indorsed thereon, (the name of the acceptor being left blank,) was handed to M, and an understanding was had, that the bill was to be accepted and then discounted for the benefit of R & E; and thereupon, M indorsed his name after R & E, but subsequently, the name of R was erased and inserted as acceptor, with the consent and privity of the holder: *Held*, that this was an alteration of the instrument to the prejudice of M; and that Equity would perpetually enjoin the holder from collecting the bill out of him. *Mahone vs. The Central Bank*..... 111
2. Demand, notice, protest, &c. are not necessary to charge

INDEX.

an indorser in a suit against him upon a note due to the Central Bank. *Ibid.*

See *Equity*, 7.

BOND.

See *Damages*, 8, 4. *Equity*, 9, 10. *Estoppel*, 1. *Insolvent Debtors*, 1. *Limitation of Actions*, 2, 8.

CA. SA.

See *Judgment*, 8.

CERTIORARI.

1. The Act of 1850, authorizing the Superior Courts to make a final decision on *certioraries*, without sending the case back, does not apply to *certioraries* from Inferior Court. *Gilmer vs. Warren & Scarborough*..... 428
2. The parties to a *certiorari* are entitled to be heard, personally or by Attorney, as in all other cases. *Selman & Co. vs. Shackelford*..... 615

CHARGE OF THE COURT.

1. The Court being called on as the Jury were retiring, to charge as "to confessions," said it was the highest evidence, if free and voluntary, but warned the Jury to weigh them as other evidence: *Held*, no error. *Mercer vs. The State*..... 146
2. Notwithstanding the Court may have charged the Jury generally, as to the several grades of homicide, still, it is the right of the defendant to ask specific instructions as to any particular point, warranted by the proof. *Terry vs. The State*..... 204

3. It is error in the Court, at the close of its charge to the Jury, to refuse to listen to a written request at the instance of either party, to farther charge the Jury, regardless of the character of the request. *Woods and another vs. McGuire's Children* 303
4. It is not error in the Court to refuse to repeat a charge which it has already given. *Corry, adm'r, vs. Tompkins*..... 361
5. Nor one unauthorized by the proof. *Jackson, adm'r, vs. Worthy*..... 323
6. It is the duty of the Court to charge the Jury on all the material points submitted, whether requested to do so in writing or not. *Pryor et al. vs. Coggins et al.*.... 444
7. A charge which precludes the Jury from considering a material circumstance, is defective. *McGuffie vs. The State*..... 497

CLAIMS AND CLAIM LAWS.

1. The withdrawal of a claim to real estate does not affect the right of the claimant subsequently to file a bill perpetually enjoining the sale. *Cox vs. The Mayor, &c.* 249
2. The Sheriff can, by order of Court, dispossess a claimant of land, against whom the judgment of the Court has been rendered, and give possession to the purchaser at his sale. *Russell vs. Slayton* 277
3. In all cases of claim from attachment or *f. fa.* the bond should be payable to the plaintiff. *Selman & Co. vs. Shackelford*..... 615
4. No form of affidavit is requisite, if it asserts property in the claimant. *Ibid.*

5. A mistake in the christian name of a person in an immaterial part of the affidavit, will not vitiate the proceedings. *Ibid.*

CONDITIONS.

See Action, 1. Covenant, 1.

CONFLICT OF LAWS.

See Slaves, &c. 6.

CONSTABLE.

1. In a suit on a Constable's bond for \$1,000, it is not incumbent on the plaintiff to aver and prove that it was taken in a town or city. *Dobbs and another vs. the Justices, &c.* 624

See Damages, 5 to 9.

CONSTITUTIONAL LAW.

1. The Legislature do not impair the obligation of any contract or interfere with any vested right, when they repeal an Act rendering permanent a county site and provide for removing the same. *Hamrick et al. vs. Rouse et al.* 56
2. The Act of 20th Feb. 1854, "to define the liabilities of the several rail road companies of this State for injury to or destruction of live stock," &c. is not in violation of the Constitution of the State of Georgia nor of the United States. *Davis and another vs. The Central R. R. & B'k'g Co.* 323

See Frauds, Stat. of, 1. Poor School Fund, 1.

CONTINUANCE.

1. It is no ground for a continuance that a witness is absent who will prove an *alibi*, when the Sol. Gen'l waives proving the offence on that day. *Dacey vs. The State* 439

CONTRACT.

1. Benefit to the creditor or injury to the debtor, will either constitute a sufficient consideration for a new contract. *Molyneaux et al. vs. Collier*..... 46
2. The doctrine has gone to the extent of holding, that the legal possibility of a benefit to the creditor, is sufficient to sustain a new agreement between him and his debtor. *Ibid.*
3. A ratification of part of a contract is a ratification of the whole. *Hunter, adm'r, vs. Stembridge et al.*..... 243
4. If, on application to a person for a donation to a school, it is represented to be a manual labor school, and he agrees, on that account, to make a donation, and afterwards, the manual labor feature is abolished, the representation is a fraud on him, and he is not bound to make the donation. *Janes vs. The Trustees, &c.*..... 515

See Evidence, 8.

CORPORATION.

1. A company owning land, throws it into the form of stock and allots shares of the stock to each member. It then levies an assessment on each share and re-pays the assessment by the issue and sale of additional shares of stock. Afterwards, it becomes incorporated and soon gets to be insolvent: *Held*, that the creditors of the corporation have no right to require the stockholders to

pay them the amount of the assessment. *Matthews et al. vs. Stanford et al.* 543

2. Misrepresentations made by a company before it has become incorporated, cannot, after the incorporation, be made the ground of an action by creditors of the corporation against the stockholders. *Ibid.*

3. Neither can fraudulent concealment on the part of such company. *Ibid.*

4. The sayings of a stockholder do not bind a corporation.

Mitchell vs. The Rome Br. R. R. & S. Co. 574

5. A stockholder in a corporation, whose stock has been forfeited, is not relieved from payment of a stock note given, though there may have been a material alteration in the charter *after* the forfeiture, without his assent. *Ibid.*

6. A provision in a charter, that upon subscription for stock the subscribers shall pay \$5 per share, is not a condition *precedent* to the legal organization of the company. *Ibid.*

7. A corporation is authorized to make contracts. *Held,* that a promissory note is *prima facie* evidence of such a contract. *Ibid.*

8. A note given by a stockholder for the Five Dollars per share subscribed, is valid and binding. *Ibid.*

Ne exeat, &c. See Equity, 4.

COSTS.

1. Where the verdict of a Jury is against an administrator in his representative character, a judgment for costs

should be entered against him in the same character.

Clements vs. Maloney, adm'r..... 289

COUNTY SITE.

1. The compensation provided by the Act of 1854 to the lot holders in Starkville for the removal of the county site, is gratuitous, and the right of the commissioners to act, does not depend upon this as a condition precedent. If the Inferior Court refuse to make it, the citizens have their remedy. *Hamrick et al. vs. Rouse et al.... 56*

2. The commissioners appointed to select a location, &c. are the agents of the Legislature, and can be controlled in their discretion only by that body. *Ibid.*

See, also, *The State ex rel. &c. vs. W. Woody et al..... 612*

See *Constitutional Law, 1.*

COURTS.

1. The Superior and Inferior Courts may be organized or continued, by the presence of the Deputy Sheriff. The High Sheriff is not indispensable. *McGuffie vs. The State..... 497*

COVENANT.

1. In some cases of mutual dependent covenants, which are conditions precedent, where several acts are to be performed, if the covenant has been in part executed, and the plaintiff has performed a part of those acts and for the residue compensation can be given in an action for breach of covenant, then he may maintain an action without averring performance. *Barnes vs. Strooker..... 340*

INDEX

CRIMINAL LAW.

1. An indictment which states the offence in the language of the Code is sufficient. *Hester vs. The State*..... 130
- See, also, *Sharp vs. The State*..... 290
2. On the trial, the panel of Jurors is put upon the prisoner. Afterwards, he is arraigned and pleads not guilty. The same panel may be again legally put on him. *Ibid.*
3. A witness may give his opinion that certain tracks were made by prisoner, giving the reasons for that opinion. *Ibid.*
4. Three years' imprisonment in the penitentiary is not too great a punishment for arson in the night, of an out-house in the country. *Ibid.*
5. The question to Jurors as to conscientious scruples having been asked, without objection, in the trial of an offence committed before the passage of the Act: *Held*, to be no error. *Mercer vs. The State*..... 148
6. Voluntary drunkenness is no excuse for crime. *Ibid.*
7. A principal in the *second* degree may be tried before the principal in the *first* degree. *Boyd vs. The State*. 194
8. An indictment for the murder of an officer of the law, need not allege that he is an officer, but it may be proved on the trial. *Ibid.*
9. If the warrant, under which an arrest is made, be not strictly lawful, yet, if the matter be within the jurisdiction of the Justice of the Peace who issued it, the killing of the officer in execution of such warrant is murder. *Ibid.*

10. It is not error in the Court to omit to give in evidence portions of the Penal Code not applicable to the case. *Ibid.*
11. The killing of a Sheriff or other officer, while in the discharge of his duty, is murder, without proof or existence of former malice. *Ibid.*
12. The law must protect its own ministers. *Ibid.*
13. A defendant, indicted for retailing without license, must take the *onus* of proving the affirmative that he has a license. *Sharp vs. The State*..... 296
14. If two or more embark in a common enterprise, the acts and declarations of each of the confederates, made or done in pursuance thereof, are evidence against the other—a *prima facie* case of concert being first made. *Tompkins vs. The State*..... 356
15. It is competent to prove that a party has assigned a false reason for his conduct, in order to convict him of the true one. *Ibid.*
16. Where two batteries are committed on the same day, it is competent for the Solicitor General, on one indictment, to try the defendant for either; but he cannot submit both to the Jury at the same time, especially if the evidence of the second was offered only for a collateral purpose. *Ibid.*
17. If the Solicitor General fail to support one by proof, can he abandon that and proceed to prove the other? *Query?* *Ibid.*
18. It is not necessary to prove the precise day alleged, except where the time is of the essence of the offence. *Dacey vs. The State*..... 439

19. To reduce a homicide to manslaughter, the slayer need not retreat from his domicile or his family. *Haynes vs. The State*..... 465
20. When two use a common well of water, and on a sudden affray one kills the other, it will be manslaughter. *Ibid.*
21. Before the law of necessity exists, a case of necessity must exist. *Ibid.*
22. To constitute self defence, the slayer must be faultless. He must be under no obligation to make his own safety a secondary object. *Ibid.*
23. An objection, that the indorsement of "true bill" was not signed by a Juror as foreman, is not good, after verdict. *McGuffie vs. The State*..... 497
24. The Jury are Judges of the law in criminal cases, in this : that they have the legal right to acquit the prisoner, though the Judge may charge them, that if certain facts be proven he is guilty, according to law, and such facts may be proven ; but the Judge is their safe and reliable adviser as to the law. *Ibid.*
25. A decision of the Court upon a criminal case, where the indictment is quashed, cannot be alleged as error upon the trial of the same offence under another indictment. *Ibid.*
26. In an indictment for riot, one defendant has no right to make a demand for trial. *McAllister vs. The State*. 618

See *Bail*, 1. *Forgery*, 1. *Jury passim*. *New Trial*, 5, 6. *Practice Superior Court*, 9. *Verdict*, 5.

DAMAGES.

1. Where the owner of a parcel of ground had been deprived thereof by an incorporated company, for the purpose of appropriating the same as a bridge site, on the trial of an appeal from the decision of the appraisers appointed to award the damages: *Held*, that the value and damage at the time the land was taken, was the thing to be ascertained; but that to discover this the Jury were authorized to look to the prospective value of the property as a bridge site, and to take that into their consideration. *Younge, assignee, vs. Harrison, adm'r.* 80
2. In ascertaining just compensation, the Jury may consider of prospective and consequential damages, and should also carry to the other side of the account the benefit to the land holder, in the increased value of his land. *Ibid.*
3. A sells B a tract of land and gives bond for titles, he having a deed from the drawer. The grant has never issued. The lot reverted and B granted it under the Act of 1843, by paying \$25: *Held*, that B could recover of A on the breach of his bond, only \$25, with interest. *Kerley vs. Richardson*..... 602
4. T C executed a bond by which, in consideration that S would yield to him a certain mortgage, he bound himself to pay \$100 to S, if he failed to give S acceptable security for the debt so secured by mortgage, within ten days; and also, to give another mortgage to S and pay the recording fee thereof. Upon breach of bond: *Held*, this was not liquidated damages, but a penalty. *Swift vs. Crow*..... 609
5. Generally, the measure of damages against defaulting officers is the injury sustained: *Debbs and another vs. The Justices, &c.*..... 624

6. Plaintiff's debt is, *prima facie*, the measure of his damages. *Ibid.*
7. If the wrong be wilful on the part of the officer, the Jury may give more, adding costs, fees, &c. *Ibid.*
8. If the wrong be not wilful, and the plaintiff is not really injured, the Jury should see to it that a mistaken officer is not made to pay greater damages than the plaintiff has suffered. *Ibid.*
9. In the latter case, the officer may show the insolvency of the debtor, &c. *Ibid.*

See *Sheriff's Bond*, 4, 5, 6.

DEBTOR AND CREDITOR.

See *Contract*, 1, 2. *Fraudulent Conveyances*, 2.

DEED.

1. A deed conveys to "the use of A and the heirs of her body, if any," and provides farther, that "in the event my said daughter A should die without child or children, then I devise the above property to be divided among my brothers and sisters": *Held*, that A took a life estate only, and that the children took by purchase and not by descent. *Williams et al. vs. Allen, ex'r...* 81
2. A deed made by the president and countersigned by the late Bank of Hawkinsville, is a good conveyance of land. *Lessee of Veasey vs. Graham.....* 99
3. An instrument, in form a deed, conveying, in consideration of \$500, a female slave, to be delivered at the death of the seller, is not testamentary. *McGraw vs. McGraw.....* 234

4. A deed takes effect from delivery, which may be by words or by acts, and to the grantee or to a third person, without special authority from the grantee to receive the same in his absence. *Welborn vs. Weaver et al.*..... 267
5. The mere retention of the deed by the grantor, will not affect its validity, unless it is agreed and understood at the time, that the deed is not to pass out of the grantor's possession. *Ibid.*
6. Delivery is no less essential to an escrow than to a deed. *Ibid.*
7. Distinction between an escrow and a deed. *Ibid.*
8. Registration of a deed does not amount, necessarily, to a delivery. When placed on record by the grantor or by his direction, it is only *prima facie* evidence of delivery, and may be explained or rebutted. *Ibid.*
9. A deed to land attested by but one witness, is not absolutely void. *Downs and another vs. Yonge, Sept. 4,*..... 295

See Registry, 1. Will, 2, 3.

DEVISE AND LEGACY.

1. A bequest of a negre child to A, "and in case she should die without an heir of her body, then the said child to be sold and the money equally divided between the three eldest brothers of A and their sister: Held, that these words create an estate tail in A. *Hollifield et al. vs. Stell.*..... 289

DISCOVERY AT LAW.

See Equity, 6. Witness, 4, 5.

DISTRIBUTION.

See Adm'res, &c. 2.

DIVORCE.

See Alimony.

DRUNKENNESS.

See Criminal Law, 6. New Trial, 4.

EJECTMENT.

1. If one takes a conveyance to land *bona fide*, believing that he acquires a fee, notice of an outstanding title cannot affect his rights. *Woods vs. McElwaine's Children*..... 203
2. Where both plaintiff and defendant deduce title from a common source, it is not necessary for either to go beyond that. *Ibid.*
3. Where there are several tenants in possession of land, claiming under different titles, a joint action cannot be maintained against them. *Ibid.*
4. Rule as to allowing a plaintiff in ejectment to use the name of a third person as a lessor. The plaintiff must have a *bona fide* subsisting claim, though defective. *Couch vs. Turner et al.*..... 489
5. Where there are several demises, and title is proven in one only, and the Counsel for plaintiff admits that he does not represent such an one, and does not know him, and no connection is made out between him and the

real plaintiff: Held, that this is not a sufficient ground for dismissing the action. *Kinney vs. Senabough et al.* 540

See Appeal, 4. Landlord and Tenant, 1. Verdict, 4.

EQUITY.

1. As a general rule, a bill for specific performance will be allowed or not, in the discretion of the Court. If the evidence leaves it doubtful whether the contract sought to be performed was made or not, the Supreme Court will not control the discretion of the Circuit Court in dismissing the bill. *Everett et al. ex're, vs. Towns.....* 15
2. Ordinarily, the satisfaction of an execution may be shown at Law, but when complicated with other matters, rendering it necessary to go into Equity, relief will be fully granted. *Molyneux et al. vs. Collier.....* 46
3. Moughon died testate, and Mitchell qualified as executor. He also became guardian of Sarah, a minor daughter. Mitchell died testate, and McDougald qualified as his executor, taking possession of Moughon's estate. He also became guardian of the minor. He removed his guardianship to another county and gave another bond: Held, that a bill filed against McDougald and the several sureties on the several bonds, was not multifarious. 2d. That suit having been commenced at Law on these bonds, the remedy was ample, and a bill would not be entertained, there being no allegation of insolvency of the principal. 3d. That if discovery is needed in these several actions, a bill must be filed in each case, and the whole cannot be consolidated for that purpose. *McDougald et al. vs. Maddox and Wife* 52
4. A writ, *ne exeat*, &c. issues only in cases where the defendant cannot be held to bail. *Hannahan vs. Nichols.....* 77

5. A sells B a slave and takes B's note, with a surety for the purchase money.. B and his surety fail to pay and have no property except this slave. B is trying to sell the slave—A alleging these facts, and that he has reason to apprehend that B will sell, &c. files a bill: *Held*, that they do not make a case for the interposition of a Court of Equity, on principles *quia timet*. *Ibid.*
6. The Statute providing for discoveries at Law, makes express provision, reserving the right to parties to file a bill for discovery. *Mahone vs. The Central Bank.* 111
7. A Court of Equity will not apply an equitable bar for the benefit of an indorser, upon a bill of exchange due the Central Bank, because of the lapse of eleven years and of the loss of his rights on prior parties to the bill, where the indorser, himself, has been guilty of *laches* in prosecuting his rights. *Ibid.*
8. In reference to partitions, the establishment of lost papers, the foreclosure of mortgages, the settlement of accounts and such like matters, the settled doctrine now is, that if a full and complete remedy has been provided here by the Statute, Equity has no jurisdiction, unless a special case is made by the bill. *Osborne vs. The Ordinary, &c.* 128
9. An ample remedy is provided at Law for suits on administrators' and guardians' bonds, and to that forum parties must go, except in special cases. *Ibid.*
10. Resort to Equity is unnecessary to adjust the relative rights of sureties to a trustee bond, the Act of 1826 having provided for their special defence and the establishment of their respective liabilities. *Ibid.*
11. Where A agrees with P, that in consideration of B's going security for him to C, he will turn over choses in

- action for his indemnity: *Held*, that A being in failing circumstances, a Court of Equity will decree a specific performance. *Shockley vs. Davis et al.*..... 179
12. Upon a proper case made, a Court of Equity will always give directions to an executor in constraining and carrying out a will. *Clark and another vs. Clark et al.*..... 485
13. There are cases, though rare, where acts done by the defendant can be made a ground for specific performance, if he be put in possession of the premises. *Prin-tup vs. Mitchell*..... 558
14. Specific performance will never be decreed in favor of a vendor who has had no prejudice. *Ibid.*
15. Equity does not execute every contract that is satisfactorily proved. There must be prejudice to the plaintiff. *Ibid.*
16. An injunction improperly granted, cannot be made the pretext for retaining a bill for relief which, of itself, is without equity. *Ibid.*
17. To maintain a bill for account, there must be some complexity in the accounts, or some other obstacle to an adjustment at Law. *Ibid.*
18. A parol contract as to land, should be so clearly, strongly and satisfactorily proved as to leave no reasonable doubt as to the agreement. *Ibid.*

See *Bills of Exchange*, 1, 2. *Grants*, 6. *Husband and Wife*, 2. *Slaves*, &c. 4, 5.

EQUITY PLEADING AND PRACTICE.

1. More technical objections to an order granted in an

- Equity cause, will not be heard as an excuse for not complying with the order, if the party objecting omits to do so until the hearing. *Thornton et al. vs. Hightower.* 1
2. In some cases, a complainant may proceed against some of many defendants of equal liability, provided it can be done without injustice to those against whom proceedings are had. *Ibid.*
3. The allowing of an answer, when the Court is proceeding to take the bill *pro confesso*, is a matter of discretion. The Court should take due precaution to see that the answer filed is a proper one. *Ibid.*
4. An answer that a deed *may have* been executed, but praying that complainant may be held to the proof, is evasive and insufficient. *Miller vs. Saunders et al.*.... 93
5. Every material averment must be answered, and defendant cannot avoid answering as to value of a slave, by saying co-complainant has no title. *Ibid.*
6. An interrogatory not sustained by the charging part of the bill, need not be answered. *Ibid.*
7. A plea should bring forward matter which reduces the cause, or the part of it covered by the plea, to a single point. And a plea introducing defences distinct in their natures, is bad for duplicity. *Cox vs. The Mayor, &c.*..... 249
8. A negative or impure plea, denying material facts charged in the bill, and as to which discovery is sought, must be accompanied by answer. *Ibid.*
9. An immaterial amendment may be refused by the Chancellor. *Johnson, adm'r vs. Worthy.*..... 420

10. Notwithstanding the answer to a bill filed for specific performance denies the agreement, still, it may be established by *aliiunde* proof. *Printup vs. Mitchell*..... 558
11. With respect to the allowance or disallowance of supplemental bills, Courts of Equity ought to follow the Statute of Amendments of 20th Feb. 1854. *Rogers vs. Solomons*..... 598
12. When such a bill is allowed, the injunction in the original bill should not be dissolved until the equity contained in the supplemental bill has been sworn off. *Ibid.*

ESCROW.

See Deed, 6, 7.

ESTATES.

See Deed, 1. *Devise and Legacy*, 1.

ESTOPPEL.

1. A party deriving title under a forged bond, may show the instrument void, in order to avoid the disadvantage of being considered, in law, as holding under the obligor. *Griffin vs. Stamper and another*..... 108
2. An estoppel *in pais* results from acts or words or both, which are intended to induce another to act in some matter touching his interest, on which he does act and by which an advantage is gained by him who speaks or acts, or by which injury results to the other party. It is founded in fraud, or in gross negligence, equivalent to fraud. *Reeves, adm'r, vs. Matthews*..... 449
3. Admissions which do not amount to an estoppel, may

be good testimony against the party making them, when regarded simply as evidence of title. *Ibid.*

See *Evidence*, 1. *Husband and Wife*, 1.

EVIDENCE.

1. Where one party proposes to withdraw from the Jury an instrument in writing submitted by himself, to which the other party objects—after verdict, the objecting party cannot complain that it was illegal evidence. *Young, assignee, vs. Harrison, adm'r*..... 30
2. In a trial for the assessing of damages for taking land for a bridge site, a plat of the land, (required by the Act of incorporation to be made and recorded in the Clerk's office) is admissible in evidence before the Jury. *Ibid.*
3. An account cannot be established by the oath of one of the partners, that he kept no clerk, but made the entries in the book himself; that the book of original entries has been burned, and that the bill of particulars filed with the complaint, was transcribed from the books by himself. *Creamer and Graham vs. Shannon*..... 65
4. A witness on a criminal trial may give his opinion, that certain tracks were made by the prisoner—giving the reasons for that opinion. *Hester vs. The State*..... 130
5. In a suit by a person standing in the shoes of a partner, against the co-partner, the admissions of the partner are not evidence in favor of the plaintiff. *Lewis vs. Allen & Leak*..... 300
6. A parol réscission of a written contract for lands, is admissible in evidence, if it has been executed. *Johson, adm'r, vs. Worthy*..... 420

7. The Supreme Court stands pledged to shut out no fact from the Jury which may assist in the ascertainment of truth. *Haynes vs. The State*..... 465
8. Where an order for goods is silent as to the place of delivery, the party giving the order may show, by parol evidence, that the goods were to be delivered to him at his residence, at the risk of the vendor. *Allen vs. Comstock & Co*..... 554
9. A witness may testify as to his *understanding* of what was said or done by the parties. *Printup vs. Mitchell*. 558
10. Where an instrument is apparently altered, it will be presumed to have been done at the time of its execution, if nothing is shown to the contrary. But the whole matter should be submitted to the Jury. *I bid*.
11. The Court, upon the usual proof of execution, will admit the paper in evidence. *I bid*.
12. A receipt from a competent witness is inadmissible, being mere hearsay. *I bid*.
13. When a person is doing any act material to be understood, his declarations, made at the time, are admissible as a part of the *res gestæ*. The Jury must judge of the *bona fides*. *I bid*.
14. To be admissible, they must be concomitant with the principal act, and connected with it. *I bid*.
15. Original papers, if to be procured, are always better evidence than copies. *Dobbs and another vs. The Justices, &c*..... 624
- See Admissions. Attorney, 1. Charge, 1. Criminal Law, 14, 15. Interrogatories. New Trial, 3. Prac-**

*tice Superior Court, 1. Principal and Surety, 4.
Process, 2. Registry. Will, 2. Witness.*

EXECUTION.

1. A *fi. fa.* which, by special order of the Court, is to stand in lieu of a lost original, though so called, is not an *alias fi. fa.* but an established copy of a lost *fi. fa.*
Kellogg & Co. vs. Buckler & Short..... 187
2. Whenever the execution is *proceeding illegally*, though *issued legally*, affidavit of illegality is the proper remedy. *Robison vs. Banks*..... 211

See *Equity*, 2. *Witnesses*, 1, 2, 3.

EXECUTORS.

See *Adm'res, &c.*

FORGERY.

1. An indictment for forging a bill, &c. in a fictitious name, need not aver that it was done, "with intent to defraud." *Phillips vs. the State*..... 459

FRAUD.

See *Contract*, 4.

FRAUDS—STATUTE OF.

1. It is doubtful if *Wain vs. Warlters* was ever settled law in Georgia. The Act of Jan'y 19th, 1852, therefore, applies to agreements made before its passage.
Baker, Wilcox & Co. vs. Herndon..... 568

FRAUDULENT CONVEYANCES.

1. Where personal property is conveyed by a husband to a trustee, for the benefit of his wife and children, the

subsequent possession of the husband being consistent with the object of the deed, is no evidence of fraud.

Clayton vs. Brown..... 217

2. To make a voluntary conveyance void against creditors and purchasers, within the Statute of *Elizabeth*, it must be covinous and fraudulent, and not voluntary only.
Ibid.

3. An assignment by a firm in insolvent circumstances, of all their assets, for the use and benefit of such creditors as should, within 90 days, file their claims with the assignee, and release the debtor, is illegal and void in this State, as against objecting creditors. *Miller et al. vs. Conklin & Co.*..... 420

GARNISHMENT.

1. In a suit against two joint makers of a note, one died before judgment, process of garnishment cannot issue against the joint debtors of the defendants, until the estate of the deceased party is represented; or such other proceedings had as will disconnect that estate from the action. *Rawson vs. Cochrane et al.*..... 80

2. So long as a fund raised by garnishment is in the hands of the Court or its officer, and not actually paid out, the Court will order it paid to the oldest executions.
Gilmer vs. Warren & Scarborough..... 423

GRANTS.

1. In England a grant is issued by the Lord Chancellor, and a record is made of it in the Court of Chancery.
Walker, guar. vs. Wells..... 547

2. When it is proposed to vacate it, a *sci. fa.* issues and

- is there adjudicated, unless an issue of fact is presented. In that event, the issue is sent to the Kings' Bench to be tried. *Ibid.*
3. In Georgia, grants are enrolled in the Secretary of State's office, which is a portion of the Executive Department not connected with the Courts. *Ibid.*
4. *Scire facias* is always founded upon a record, and issues from and is returnable to the Court where the record is kept; and when employed to revoke a grant, must be for some matter within the body of the grant. *Ibid.*
5. Without legislation, the Courts in Georgia have no jurisdiction by *sci. fa.* over disputed questions relative to grants. *Ibid.*
6. A proceeding by bill to cancel a grant, is a doubtful question even in England. How can it be exercised in Georgia? *Ibid.*
7. The Act of 1837 applies only to mistakes made in the Executive Department, and not to mistakes alleged to have been made by the person receiving the draws. *Ibid.*
8. The Act of 1827 and 1828 apply to specific counties. No act applies to the Cherokee counties. *Ibid.*

HIGHWAY.

See *Roads*.

HUSBAND AND WIFE.

1. Where a husband receives property as the separate estate of his wife—treats it as such, and in his will re-

cites, that in consideration of that separate estate he makes no other provision for her: *Held*, that his executor was estopped to deny the separate estate of the wife in the same. *Williams et al. vs. Allen, ex'r.*..... 21

2. In this case the testator's mistake is not relievabie in Equity, because he did by mistake what, in equity and good conscience, he should have done. *Ibid.*
3. If negroes belonging to the wife are converted before marriage, the husband alone must sue. *Welborn vs. Weaver et al.*..... 267
4. To defeat the marital rights, the intention to create a separate estate in the wife must be unequivocal. *Wade et al. vs. Russell.*..... 425

See Alimony. Fraudulent Conveyances, 1. Limitation of Actions, 4, 5.

ILLEGALITY.

See Execution, 2. Witness, 3.

INJUNCTION.

1. Under the Act of 1842, the Judge of the Superior Court may, in his discretion, grant a second injunction. *Cox vs. The Mayor, &c.*..... 249

See Claims, &c. 1. Equity, 16. Equity Pleading and Practice, 12.

INSOLVENT DEBTORS.

1. Appearance of the debtor at any time during the term, before the Juries are discharged, is a performance of

- the condition of a *ca. sa.* bond. *Shannon vs. Roosevelt, Hyde & Clark*..... 88
See also Woods, ex'r vs. Woods et al. 293

INTERROGATORIES.

- Where the direct and cross interrogatories are precisely the same, the latter may be answered by reference to the answers of the former. *Printup vs. Mitchell*..... 558
- The execution is not defective, though the caption be in the hand-writing of the party and the answers in the hand-writing of the witness. *Shropshire & Hawkins vs. Stevenson*..... 622

JUDGMENT.

- A judgment is not dormant, upon which execution is issued in less than two years from its date, and on which entries by the Sheriff follow each other in less than seven years' intervals. *Kellagg & Co. vs. Buckler & Short*..... 167
- The Dormant Judgment Act does not apply to judgments in favor of the Central Bank. *The Central Bank vs. Williams, adm'r*..... 193
- A *ca. sa.* issuing is sufficient to keep a judgment from becoming dormant, if the *ca. sa.* is executed within seven years from its date. *Strawbridge vs. Mann et al.* 454
- As between judgments obtained in different Courts or at different terms of the same Court, the first signed is prior in point of law. *Johnson et al. vs. Mitchell*..... 593

See Limitation of Actions, 6, 7. New Trial, 2.

JURISDICTION.

See County Site, 2.

JURY.

1. A Juror, before he was sworn, said, "if what he heard was so, the prisoner ought to be hung." He was not placed on his *voire dire*: Held, that this was not a good ground to disturb the verdict. *Mercer vs. The State..* 146
2. The unanimous verdict of a Jury cannot be impeached by a Juror swearing he never did agree to it, especially, when polled, he said it was his verdict.
3. It is within the discretion of the Court to determine the number of which the panel of Jurors shall consist in capital cases, and the number of panels which may be at the same time summoned. *McGuffie vs. The State..?* 497
4. It is not necessary that the names of the *tales* Jurors should be in the Jury box, if they are qualified to serve as Jurors at the time of trial. *Ibid.*
5. If several Jurors be sworn when another is challenged, the Court may assign any two of those summoned to try the challenge. *Ibid.*
6. It is unnecessary to consider the merits of an objection to Jurors, over-ruled by the Court, if upon other grounds the Jurors are passed for cause. *Ibid.*
7. The first Juror sworn should sit with the two triors and try the next challenge. *Ibid.*
8. A Juror who has heard any portion of the evidence

under oath, and expressed a decided opinion thereon, is incompetent; and it is good ground for a new trial, if discovered after trial. *Ibid.*

JUSTICES' COURTS.

1. The Act of 1852, enlarging Justices' Court jurisdiction in the City of Macon, extends to cases of joint promisors, some of whom reside without the city. *Freeman & Benson vs. Carhart Bro's & Co.*..... 348

See *Amendment*, 3.

LAND.

See *Ejectment*.

LANDLORD AND TENANT.

1. If one takes a conveyance to land and goes into possession, recognizing another as the true owner, he holds in subordination to the tenant in fee. *Woods and another vs. McGuire's Children*..... 303

LIEN.

See *Attorney*, 2.

LIMITATION OF ACTION.

1. An acknowledgment of a debt by an executor, before it is barred, is sufficient to take it out of the Statute of Limitations. *Griffin, adm'r &c. vs. The Justices, &c.* 96
2. A bond, though forged, if accepted as *bona fide* by the obligee and those claiming under him, gives a color of title under the Statute. *Griffin vs. Stampfer and another*..... 108

INDEX.

3. The Statute does not ran against a debt due to the Central Bank. *Mahone vs The Central Bank*..... 111
4. To make the saving in favor of *femes covert* available, they must be *covert* at the time the right of action accrued. *Welborn vs Weaver et al.*..... 267
5. Marriage may be postponed, but the Statute of Limitations cannot. *Ibid.*
6. Four years' possession of a chattel in another State, does not divest a lien of a judgment obtained before its removal from this State, under the Act of 1822. *Hammond vs. Stovall*..... 491
7. Nor will the Statute of Limitations of that State protect the purchaser, especially as the Courts of that State have, on a similar case, declined to recognize our Statute. *Ibid.*
8. A vendee holding under a bond for titles, does not hold adversely to vendor. *Paxson vs. Bailey and another*. 600
9. Adverse possession is a mixed question of law and fact. *Ibid.*

See *Banks*, 2. *Equity*, 7.

LUNACY.

1. The "physician" intended by the Act of 1834, is a person licensed as a physician in this State. *Norwood vs. Hardy*..... 595

MANDAMUS.

See *Appeal*, 8.

MANUMISSION.

See *Slaves*, &c. 4, 5, 6.

INDEX.

MISNOMER.

See *Pleading*, 4.

MISTAKE.

See *Husband and Wife*, 2.

NEW TRIAL.

1. When a brief of the evidence is agreed upon by Counsel and approved by the Court, and ordered to be entered upon its minutes, and the brief is omitted to be recorded by the Clerk; it is nevertheless a substantial compliance with the 61st rule, and a *nunc pro tunc* order may be taken at the hearing, to have the brief put upon the minutes. *Dunn vs. Crozier, adm'r*..... 70
2. The over-ruling of a demurrer, though wrongfully, is no ground for a new trial. It may be for an arrest of judgment. *Griffin vs. The Justices, &c*..... 96
3. The party swears that he has discovered new evidence; that A has told him that B told him, that he heard the opposite party make a certain statement: *Held*, that the application is not sufficiently verified. *White vs. Wallen*..... 106
4. The verdict should not be set aside because the principal witnesses for the State were intoxicated at the time of the transaction, especially when the confessions of the prisoner support the verdict. *Mercer vs. The State*..... 146
5. Misdirection of the Court upon an abstract question, not appertaining to the issue, is no ground for a new trial. *Boyd vs. The State*..... 194

6. The setting down of a Juror by the State's Counsel, without objection from the prisoner, upon a misapprehension of his answer by the former, is no ground for a new trial. *Ibid.*
7. Under the New Trial Act of 1852-'4, the defendant is not called upon to show, affirmatively, that injury has resulted from the refusal of the Court to give a legal charge as requested. The Statute assumes that damage is done and will listen to no allegation to the contrary. It makes the refusal to give a legal charge when requested, and the granting a new trial convertible terms. *Terry vs. The State*..... 204
8. If the evidence is so slight and unsatisfactory as not to authorize a verdict, a new trial should be granted. *Keaton et al. vs. The Gov. &c.*..... 228
9. A new trial will not be granted because the verdict is contrary to the charge of the Court, if the charge itself is erroneous. *Welborn vs. Weaver et al.*..... 267
10. While a case is on trial, Counsel for the prevailing party entertains for a night such party, with two of the Jurors: *Held*, that this is a sufficient ground for a new trial. *Walker, ex'r, vs. Hunter et al.*..... 364
11. If a paper, calculated to influence the Jury, is improperly before them while making their verdict, and they find for the party in whose favor it would influence, it is ground for a new trial. *Ibid.*
12. Where the verdict is not strongly against the weight of evidence, a new trial ought not to be granted.—*Wright vs. Greenwood & Co.*..... 418
13. A new trial will not be granted for newly discovered evidence, which does not tend to prove facts that were

not directly in issue on the trial, and were not then known and investigated by proof. *Ibid.*

14. If the verdict be right, a new trial will not be granted in the Supreme Court for mistakes in the Court below, unless a motion was made therefor in the Court below. *Causey & Ostin vs. Miller*,..... 435
15. Courts are slow to disturb verdicts occasioned by want of diligence; but where justice demands it, it will be done. *Dacey vs. The State*..... 439
16. Thus, where a party is convicted because the papers are not to be found showing a former acquittal, and they are found in possession of the State's Counsel, a new trial will be granted. *Ibid.*

See *Amendment, 2. Jury, 1, 2.*

ORDINARY COURT.

1. Service, in Ecclesiastical Courts in England and in our Ordinary Court, is perfected by citation to kindred and creditors. *Mitchell vs. Pyron*..... 416
2. Any creditor thus served, becomes a party; and if he is dissatisfied with the appointment of an administrator, may appeal, whether he objects in the Ordinary or not. *Ibid.*

See *Lunacy, 1.*

PAROL EVIDENCE.

See *Evidence, 8.*

PARTNERS AND PARTNERSHIP.

1. One partner may acknowledge service of a writ in the name of the partnership, if he does it in the presence of the other partner and with his consent. *Freeman & Benson vs. Garhart Bros. & Co.* 348

See *Evidence*, 3, 5. *Garnishment*, 1.

PHYSICIAN.

See *Lunacy*, 1.

PLEADING.

1. The Act of 1847, to simplify, &c. applies to cases for and against an administrator. *Tuggle adm'r, vs. Wilkinson* 90
2. A *retraxit* is an open and voluntary renunciation of his suit in Court, by the plaintiff. *Cox vs. The Mayor, &c.* 249
3. A plea to the jurisdiction must be verified. *Bass vs. Stevens et al.* 578
4. A plea of misnomer is sufficiently answered, by proof that a party is as well known by one name as the other. *Selman & Co. vs. Shackelford* 615
5. The rule in criminal pleading, as to negativing the exceptions to the Statute in the indictment, does not apply to civil pleadings. *Dobbs and another vs. The Justices, &c.* 622

See *Equity Pleading*. *Husband and Wife*, 3. *Trusts*, 2. *Verdict*, 4.

POOR SCHOOL FUND AND TEACHERS.

1. The Act of 1853-'4, requiring the Treasurer of Muscogee County to pay certain teachers, is not unconstitutional. It does not impair the obligation of any contract. *Johnson, Ordinary, vs Abbott et al.*..... 179
2. Under the Act of 1852, the accounts of teachers of the poor are not extinguished by receiving the *rateable* distribution provided by that Act, but the balances stand in order to be paid out of the taxation of the next year, before the accounts of teachers for service rendered in that year. *I bid.*

POSSESSION.

See *Ejectment*, 1, 2. *Landlord and Tenant*, 1.

POWER.

1. A naked power, uncoupled with an interest, is determined by the death of the principal. *Wellborn vs. Weaver et al.*..... 207

PROCESS.

1. Where there is no process annexed to or accompanying the petition, and no waiver of process, the whole proceeding is radically defective, and advantage may be taken of it at any stage thereof. *Brady vs. Hardeman & Hamilton*..... 67
2. Process appearing regular upon its face, the official attestation of the proceedings is *prima facie* evidence of the genuineness of its execution. *Dobbs and another vs. The Justices, &c.*..... 624

INDEX.

67

PRACTICE SUPERIOR COURT.

1. The order in which evidence is to be introduced, is a matter within the discretion of the Court. *White vs. Wallen*..... 106
2. The 65th rule of Court, is somewhat ambiguous as to the filing of an order for the issuing of *sci. fa.* to make parties. The practice of the Courts not having required the filing of such order, it will not be interfered with. *McDougald, adm'x, vs. Carey, assignee*..... 185
3. Where, by consent, a Jury returns a verdict to the Clerk—"we the Jury, find for the plaintiff": *Held*, that it is regular to allow the verdict amended, by adding the amount. *Barnes vs. Strohecker*..... 340
4. Where a party supposing he had the consent of Sol. Genl. to his absence, is not present when his case is called, but comes into Court in a few minutes, and before judgment is entered on his recognizance: *Held*, that the Court should excuse his absence and arrest the judgment. *Smith vs. The State*..... 462

See *Interrogatories*.

PRACTICE SUPREME COURT.

1. Where the Court below wrongfully refused to grant a *supersedeas*, still, a reversal will not be granted on that ground alone. *Hamrick et al. vs. Rouse*..... et al. 56
2. Under the Act of 1850, the transcript of the record may be sent up at any time before the first day of the term. *Hodges vs. Myers, Suydam & Co*..... 292

PRINCIPAL AND AGENT.

1. Public officers or agents contracting for the State, are not individually liable for obligations assumed in that character. *Tucker and another vs. Shorter et al.*..... 620

PRINCIPAL AND SURETY.

1. The liability of a surety cannot be extended beyond the actual terms of his engagement; and will be extinguished by any act or omission which alters the terms of the contract without his consent. *Taylor et al. vs. The Gov. fc.*..... 521
2. It matters not whether the alteration be for his benefit or not. He has a right to stand upon the terms of his agreement. *Ibid.*
3. The only question in all such cases is, has the identity of the contract been destroyed? and would the plea of *non est factum* be dismissed on demurrer on the ground that the bond is the same? *Ibid.*
4. If the admissions of the principal are made during the transaction of the business for which the surety is bound, they become a part of the *res gestæ* and admissible. *Dobbs et al. vs. The Justices, fc.*..... 624

See *Sheriff's Bond.*

PROMISSORY NOTES.

1. "Due A B \$500 payable on demand" is a good promissory note *prima facie*. *Mitchell vs. the Rome Br. R. R. Co.*..... 574

See *Corporations*, 7, 8. *Garnishment*, 1.

PUBLIC OFFICERS.

See *Principal and Agent*, 1.

RAIL ROADS.

See *Corporations*, 4 to 8.

REGISTRY.

1. A deed attested thus: "*In presence of A B and C D, J. P.*" is properly admitted to record. The law presumes the witnesses saw the parties sign, seal and deliver. *Dinkins et al. vs. Moore et al.*..... 62

See *Deed*, 8.

ROADS AND HIGHWAYS.

1. To maintain an action for an injury received from an obstruction in a highway, two things must concur: an obstruction by the fault of defendant, and no want of ordinary care by the plaintiff. *Branan vs. May*..... 136

SATISFACTION.

See *Contract*, 1, 2. *Equity*, 2.

SCI. FA.

See *Abatement*, 2. *Bail*, 1. *Grants*. *Practice Sup. Court*, 1.

SERVICE.

See *Ordinary Court*, 1.

SHERIFF.

1. It is illegal for a Sheriff to sell under a *f. fa.* property upon which it has not been levied. *Kellogg & Co. vs. Buckler & Short*..... 187

 2. The Sheriff is not subject to be ruled out of his county.
Ibid.

See also *Hodges vs. Myers, Suydam & Co*..... 292

 3. A Deputy Sheriff may appoint a bailiff to do a particular act, though he cannot appoint a bailiff to do the general business of his office. *McGuffie vs. The State*. 497

 4. Several plaintiffs in *f. fa.* may unite in a money motion against the Sheriff. *Taylor, et al. vs. The Governor, &c.*..... 521

 5. If sued for not levying an attachment, he may prove paramount title in another. *Dobbs and another vs. The Justices, &c.*..... 624

 6. The averment of neglect of official duty ought to be supported by *some proof* on the part of the plaintiff.
Ibid.
- See *Claims and Claim Laws*, 2. *Courts*, 1. *Damages*, 5, *et seq.*

SHERIFF'S BOND AND SURETIES.

1. Under the Acts of 1799, 1803 and 1845, is it the duty of the Judge of the Superior Courts to examine into the solvency, as well as the legality of Sheriff's bond?
Taylor et al. vs. The Gov. &c...... 521

2. If a bond be executed by H H & C, as sureties for

T and the bond is rejected by the officer appointed to take it; and afterwards, without the knowledge of H H & C, W is added as a surety, is the bond void as to H H & C? *Ibid.*

3. A rule absolute against the Sheriff is conclusive against him, and *prima facie* evidence only against the sureties. *Ibid.*

4. The rule that the whole sum must be given, is never applied to an action of debt upon the Sheriff's bond. It is only in debt for an escape, under the Statutes of Ed. III and Rich. 1. *Ibid.*

5. The only object of our law in requiring the bond, was to give more ample security for the faithful discharge of duty. *Ibid.*

6. At Common Law, the whole penalty on the bond would be recoverable; but under the Statute of 8 and 9 Wm. III. ch. 11, (adopted in Ga.) no greater recovery can be had than the actual damage done. *Ibid.*

See *Principal and Surety.*

SLAVES AND FREE PERSONS OF COLOR.

1. Where the person hiring a slave gives bond, with security, for the forthcoming of the slave at the end of the year: *Held*, that this is a specific contract of bailment, and that the bailee is not relieved from liability on his bond, by showing that the slave ran away without fault on his part. *Curry vs. Gaulden et al.*..... 72

2. A hires two slaves of B and gives his note for the hire. B takes one of the slaves away, without A's consent:

- Held*, that this would be a good plea of partial failure of consideration. *Tompkins vs. Tigner*..... 103
3. The Colonial Act of 1770, providing a mode for slaves to sue for their freedom, is still in force in Georgia.
Knight pro ami vs. Hardeman et al..... 253
4. The Acts of 1770, 1835 and 1837, afford a full and adequate remedy to enable persons of color to assert their freedom, and a special case must be made to give jurisdiction to a Court of Equity. *Ibid.*
5. Under the Act of 1770, *any* Judge in the State may appoint a guardian *ad litem*, for the alleged free person of color. *Ibid.*
6. The laws of Maryland allow manumission to take effect when a slave arrives at a certain age. Before that time he removes to Georgia, where manumission is prohibited. *Query*. Will Georgia enforce the Maryland Law?
I bid.

See *Equity*, 5.

SPECIFIC PERFORMANCE.

See *Equity*, 12 to 15. *Equity Practice*, 10.

STATUTE OF FRAUDS.

See *Frauds—Statute of*.

SURETIES.

See *Principal and Surety*.

TROVER.

See *Abatement*, 1.

TRUSTS AND TRUSTEES.

1. The law looks with suspicion upon a contract made between the trustee and his *cestui que trust*; and with still more odium upon a purchase made from himself as trustee. Still, such contracts are not absolutely void, but voidable only. *The Lessee of Veasey vs. Graham et al.* 90
2. Where the suit by a trustee is on account of any matter which concerns the execution of the trust, then, unless for some reason of necessity, the *cestui que trust* must be made a party. *Burney vs. Speer and another.* 228
3. Every trustee, in Georgia, is entitled to compensation for the execution of the duties of his trust. *Ibid.*
4. As a general rule, the Courts of Chancery will not permit a trustee to encroach upon the trust fund or sanction an expenditure exceeding the income of the estate; but if, from circumstances which do not result from the fault of the trustee, there be no income or interest out of which the trustee may get compensation for his care, trouble and attendance in managing the fund, then he may receive payment out of the principal. *Ibid.*

See *Equity*, 10. *Husband and Wife*, 1, 2.

VENDOR AND PURCHASER.

See *Fraudulent Conveyances*.

VERDICT.

1. The verdict must comprehend the whole issue or issues submitted to the Jury. *Woods vs. McGuire's Children* 261

2. Every reasonable construction is to be adopted in favor of the verdict, and if it be informal, the Court will work it into form and make it serve. *Ibid.*
3. The Court cannot supply substantial omissions. *Ibid.*
4. Under the *Jones'* form of ejectment, the verdict must be for or against all the parties. *Ibid.*
5. "We, the Jury, from the evidence produced, find the prisoner guilty of murder," is a general, and not special verdict. *McGuffie vs. The State*..... 497

See *Practice Superior Court*, 3.

WAIVER.

See *Evidence*, 1.

WILL.

1. A paper, in form a deed, delivered to an agent of the grantor, to be kept by him, and at the death of the grantor, delivered to the grantees, is a will and not a deed. *Welborn vs. Weaver et al.*..... 267
2. Whether an instrument be a deed or a will, does not depend upon its form or manner of execution, but upon its operation. *Ibid.*
3. The intention of the maker may be ascertained not only from the instrument itself, but also from extrinsic evidence. *Ibid.*
4. If it is the rule of the Ecclesiastical Courts of England, that the evidence of as many as two witnesses is necessary to prove the execution of a will, it is not the rule of this State. *Walker, ex'r, vs. Hunter et al.*..... 364

5. Although a person may lawfully move a testator to make him executor or legatee, yet, if the testator is of weak judgment and easily persuaded, and the legacy great, a very strong presumption arises, that the "moving" is of a sort not right or lawful—a presumption only to be rebutted by evidence that the will was such as a man of average mind, morals and family love might be supposed willing to make. *Ibid.*

See *Deed*, 3. *Devise and Legacy*, 1.

WITNESSES.

1. A witness cannot claim fees for attendance after a case has been continued or postponed, although he may not have heard the announcement of its postponement.

Robisen vs. Banks..... 211.

2. The same witness, summoned by the same party, in several cases, may charge full fees in each case. *Ibid.*

3. Upon an issue formed upon an affidavit of illegality to a subpoena proven, the account of the witness sworn to on subpoena, is *prima facie* correct until disproved. *Ibid.*

4. A party, when put upon the stand as a witness, under the Act of 1854, is liable to be cross-examined as other witnesses now, by law, are. *Woods and another vs. McGuire's Children*..... 303

5. The regular mode of conducting the examination of a witness, discussed and prescribed. *Ibid.*

6. The widow, being interested in her year's support from an estate, is an incompetent witness for the administrator in a suit to recover property for the estate. *Johnson, adm'r, vs. Worthy*..... 420

7. Where a party brings several actions and, by agreement, the verdict in one decides all, and the agreement specified, that in that trial all evidence should be admitted which would be admissible in either case: *Held*, that the defendant, in one of the other cases, is a competent witness. *Reeves vs. Matthews*..... 449
8. The rule as to corroboration of and credit given to impeached witnesses. *Haynes vs. The State*..... 465
9. A party to a suit cannot be a witness for himself. *Janes vs. The Trustees, &c*..... 515
10. He who alleges a witness to be interested, must show it. *Ibid.*

See *Attorney*, 1.

